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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-889

DAVID M. BELL,

Petitioner,

versus

TAYLOR'S WELDING SERVICE, INC., ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
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DAVID M. BELL,

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versus

TAYLOR'S WELDING SERVICE, INC., ET AL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF LOUISIANA

The petitioner, David M. Bell, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana, denying petitioner's application for writs thereto; that writ was applied for to review the judgment and opinion of the Third Circuit Court of Appeal of the State of Louisiana, which judgment reversed a jury verdict under the Jones Act rendered in the Fourteenth Judicial District Court, Parish of Cameron, Louisiana, in plaintiff's favor; the said writ was denied by the Louisiana Supreme Court on October 24, 1974.

I.

OPINIONS BELOW

The judgment of the Louisiana Supreme Court denying petitioner's application for writs is reported at 302 So.2d 27, and is reproduced in Appendix "A" to this petition. The opinion of the Louisiana Third Circuit Court of Appeal in which petitioner's jury verdict was reversed and rendered is reported at 298 So.2d 327, and is reproduced in Appendix "B" to this petition.

II.

JURISDICTION

(1) The final judgment of the Louisiana Supreme Court denying petitioner's timely application for writs thereto was entered October 24, 1974.

(2) The jurisdiction of this court is invoked under the provisions of 28 USC 1257(3). The action of the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal in reversing petitioner's jury award has trampled upon petitioner's federally protected rights and privileges under the Jones Act, 46 USC 688.

III.

QUESTIONS PRESENTED FOR REVIEW

(1) Should a State Court of Appeal be allowed to exercise the same *broad powers* of appellate review of both law *and fact* and to apply the same standard of

negligence in a Jones Act case, 46 USC 688, as it is allowed to exercise and apply under the State Constitution in *ordinary* civil cases?

(2) Should a Jones Act employer be allowed to avoid its duty to provide its employees with a safe place to work and thus avoid liability to its employee by *delegating* away the duty to provide safe work premises?

IV.

FEDERAL STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of the Jones Act, 46 USC 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the dis-

trict in which the defendant employer resides or in which his principal office is located."

Also attached hereto as Appendix "C" is the Federal Employer's Liability Act, 45 USC 51-60, upon which most of the substantive provisions of the Jones Act are based.

V.

STATEMENT OF THE CASE

Plaintiff-applicant, David M. Bell, filed this suit under the Jones Act and general maritime law for damages for personal injuries received by him arising out of an accident which occurred aboard the M/V STATE RACE. The accident occurred during the performance of repair work by defendant, Taylor's Welding Service, Inc. (Taylor), on Mobil Oil Corporation's (Mobil) offshore production platform in Block 110, West Cameron Area. Made defendants were Taylor's Welding Service, Inc., plaintiff's employer at the time of the accident, and its insurer, and National Boat Corporation, the owner of the vessel on which Bell was working at the time he sustained the injury, and its insurer.

Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer; Taylor's Welding Service, Inc. subsequently asserted a third-party demand against National Boat Corporation and its insurer.

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor con-

tracted to do certain welding repair work on a production platform of Mobil Oil Corporation about forty miles offshore of Cameron Parish, Louisiana. Under the agreement, Taylor furnished the necessary labor, equipment and supplies to perform the welding, and the vessel STATE RACE was made available to Taylor's crew for living quarters and as a base for the repair work, most of which was near and below water level on the platform.

Taylor's welding crew and all of their equipment and materials were loaded onto the STATE RACE in Cameron, Louisiana, at the Mobil docks, and the vessel proceeded to the platform where it was moored for its work.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located six to eight feet forward of the stern. The hawser ran aft twenty-five or thirty feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming. Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had begun and was in progress when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welders on the platform. For about forty-five minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, the stern of the vessel dropped, and the hawser (which was improperly and insufficiently secured) came over the starboard rail, striking plaintiff on the leg and causing a fracture.

The case was tried to a jury, which returned special verdicts in the form of written interrogatories finding: (1) that David Bell was a seaman under the Jones Act; (2) that Taylor's Welding Service, Inc., Bell's employer, was guilty of negligence which was a proximate cause of the accident; (3) that David Bell was not guilty of any contributory negligence which was a proximate cause of the accident; and (4) awarding damages to the plaintiff in the amount of $36,000.00. The jury further found that the vessel STATE RACE was not unseaworthy and that the National Boat Corporation was not guilty of any negligence which was a proximate cause of the accident. The district court entered judgment on the jury verdict in favor of plaintiff in the amount of $36,000.00. It rejected Taylor's third-party demand against National Boat Corporation because of the jury's finding that the vessel was seaworthy and that there had been no negligence on the part of National Boat Corporation.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third-party demand against National Boat Corporation. On July 29, 1974, the Louisiana Third Circuit Court of Appeal reversed petitioner's jury verdict and rendered judgment rejecting Bell's suit, all at his costs.

Bell's counsel received notice of the above opinion on July 29, 1974 and timely filed an application for rehearing, which was denied by the Louisiana Court of Appeal, Third Circuit, on August 21, 1974.

The decisive issues to be determined in the case were properly outlined by the Louisiana Court of Appeal in its

opinion at page 2 (Appendix "B", page 3a), wherein the court stated these issues to be as follows:

(1) Was the plaintiff a seaman?

(2) Was Taylor's Welding Service, Inc. an employer under the Jones Act?

(3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

The court then analyzed each of these issues and, in answer to the first two questions properly determined affirmatively that the plaintiff, David M. Bell, was a seaman within the contemplation of the Jones Act, and that his employer, Taylor's Welding Service, Inc., was an employer under the Jones Act. However, when it reached the third issue, i.e. *negligence* of the employer, the court reversed the jury's finding of negligence, thereby denying Bell's claim and, in doing so, committed grave errors of law. The court erred first in defining the scope of its appellate review and the standard of care owed by employers under the Jones Act; secondly, and more importantly, in applying that standard of appellate review and that duty of care to the facts of this case; and lastly, in allowing the Jones Act employer to avoid liability by delegating away that duty to its employees. The court, differing with the jury's interpretation of the evidence, substituted its own judgment for that of the jury and reversed the judgment of the lower court, rejecting plaintiff's demands at his costs.

The Louisiana Supreme Court declined to grant the plaintiff a hearing and denied petitioner's writ application on October 24, 1974. The Louisiana Supreme Court made no independent observations and gave no written reasons for denying Bell's writ, merely stating that the Court of Appeal was correct. Thus it is the Louisiana Third Circuit Court of Appeal's written opinion that must be analyzed herein.

VI.

STAGE IN PROCEEDINGS AND MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

This suit from its inception has been based upon the provisions of the Jones Act which provides protection for seamen suffering personal injury during the course and scope of their employment and which provides a right of action for damages against the seaman's employer. The federal questions sought to be reviewed herein arose upon the rendition of judgment and written reasons therefor by the Louisiana Third Circuit Court of Appeal reversing a jury verdict that had been rendered in favor of petitioner, David M. Bell, in the amount of $36,000.00.

The questions presented for review were first raised in petitioner's Application for Writs to the Louisiana Supreme Court to review the Third Circuit's judgment by Assignment of Errors contained in that application. The Louisiana Supreme Court denied petitioner a hearing on those assignments of error, merely stating that "The judgment of the Court of Appeal is correct."

The Assignments of Error, as originally stated in petitioner's Application for Writs to the Louisiana Supreme Court, are quoted as follows:

"*ASSIGNMENT OF ERRORS*

THE COURT OF APPEAL ERRED:

(1) IN INSUFFICIENTLY AND IMPROPERLY DEFINING THE SCOPE OF APPELLATE REVIEW OF JURY FINDINGS AND THE STANDARD OF NEGLIGENCE REQUIRED TO HOLD AN EMPLOYER LIABLE TO ITS EMPLOYEE UNDER THE JONES ACT.

(2) IN IMPROPERLY APPLYING THE STRICT AND VERY LIMITED SCOPE OF APPELLATE REVIEW OF JURY FINDINGS UNDER THE JONES ACT TO THE FACTS OF THE PRESENT CASE, AND IN IMPROPERLY APPLYING THE JONES ACT STANDARD OF NEGLIGENCE REQUIRED TO HOLD THE EMPLOYER LIABLE TO ITS INJURED EMPLOYEE.

(3) IN HOLDING THAT A JONES ACT EMPLOYER, SUCH AS TAYLOR'S WELDING SERVICE, INC., MAY AVOID ITS DUTY TO PROVIDE ITS EMPLOYEES WITH A SAFE PLACE TO WORK AND THUS AVOID LIABILITY TO ITS EMPLOYEE, DAVID M. BELL, BY DELEGATING AWAY THE DUTY TO PROVIDE SAFE WORK PREMISES."

VII.

SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS WRIT OF CERTIORARI

> "Special and important reasons for the grant of certiorari in these cases are certainly present when both federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 451, 1 L.Ed.2d 493.

A Jones Act seaman is injured aboard a vessel during the course and scope of his employment when the hawser, by which the vessel is improperly moored, jumps over the railing of the vessel and strikes the seaman's leg. The plaintiff's Jones Act employer admits never even having seen the vessel prior to the time it departed for the job site, much less inspected it to insure that the vessel constituted a safe place to work. The trial jury, finding negligence on the part of the employer, awards a substantial verdict to the plaintiff. The Louisiana Third Circuit Court of Appeal disagrees with the jury's finding of employer negligence and therefore substitutes its own judgment for that of the trier of fact, reversing the jury's finding of employer negligence, and denying the plaintiff's claim for Jones Act relief.

Should appellate courts be allowed to exercise such excessively broad powers of appellate review of jury findings in a Jones Act claim, thereby imposing a narrow and niggardly construction of the employee's rights under the Jones Act — especially when the record uncontrovertibly shows that the employer made no effort whatsoever to in-

sure safety of the employee's work premises, or at the very least to warn the employee of the dangerous condition on the premises that ultimately resulted in his injury?

The Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal answered "yes" to this question and effectively exercised in this Jones Act case the same standard of appellate review as it is allowed to exercise in ordinary civil cases. This amounts to a serious and substantially prejudicial deprivation to this Jones Act employee of the rights intended for him by the Congressional enactment.

The Louisiana Third Circuit Court of Appeal, affirmed by the Louisiana Supreme Court, has upset a substantial jury verdict awarded to a Jones Act employee seriously injured during the course and scope of his employment solely on the basis that the appellate court interpreted the evidence of employer negligence differently from the way the jury interpreted it. Under the above circumstances, just as in *Rogers* v. *Mo. Pac. R.R. Co.*, supra, special and important reasons for the grant of certiorari are present when a lower state court has deprived a Jones Act employee of his right to a jury determination.

At page 4 of its opinion, the Louisiana Court of Appeal made the following observation as to the state court's scope of appellate review in Jones Act claims:

> ". . . a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, *an appellate court cannot disturb the finding of fact of a trial*

> *jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion.*" Citing *Trahan* v. *Gulf Crews, Inc.*, La. 255 So.2d 63 (1971). [Emphasis ours] (App. p. 5a)

Though this observation by the lower court is indeed correct, it does not go nearly far enough in defining the very narrow and limited scope of appellate review in Jones Act cases and fails to recognize the full import of the *Trahan* decision, supra, but *even more significantly*, it fails to recognize the full import of the *foundation* of *Trahan* in the U.S. Supreme Court decisions of *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, and *Lavender* v. *Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916. As recognized and reiterated by the Louisiana court in *Trahan*, supra, the *Rogers* decision held that in Jones Act cases the judicial right of review of facts is restricted to the *single inquiry* of whether, within reason, the evidence adduced supports the conclusion that the negligence of the employer played *any part at all* in the injury or death of the employee. [77 S.Ct. 448] The Louisiana court went on in *Trahan* to emphasize the Supreme Court's reasoning in *Rogers*, stating:

> "The court stressed the special and important reasons for granting certiorari in such cases 'when *lower* federal and *state courts persistently deprive litigants of their right to a jury determination*' by substituting their own view of the facts for the jury's findings and, in this manner, erode Congressional intent in the enactment of such acts 'by narrow and niggardly construction.' " [Emphasis ours]

Similarly pertinent to the present case is the following quotation from the U. S. Supreme Court's decision in *Lavender* v. *Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. * * * Only when there is a *complete absence of probative facts* to support the conclusion reached does a reversible error appear. But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." [Emphasis ours]

Further elaboration on the burden of proof and standard of negligence required to be proven for recovery under the Jones Act is found in *Rogers*, supra, at 77 S.Ct. 448. The court states that:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the

single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

"* * * for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference."

"Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

"* * * In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the Congressional scheme. We reach the same conclusion in this case. The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions *exclusively* in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. Special

> and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." [Emphasis ours]

What the court seemed to be saying in *Rogers* and in *Lavender* was that in Jones Act claims, such as this claim of David M. Bell, **the jury's findings are not to be taken lightly and should not be disregarded by State Courts of Appeal.** The Court of Appeal's judgment should be substituted for the findings of a jury *only in the most extreme circumstances.* Though the Louisiana Court of Appeal in David Bell's case gave lip service to those principles set forth in *Rogers* and *Lavender*, it in effect applied the same standard of appellate review of fact to the plaintiff's case that is exercisable in all ordinary state cases, i.e. the Court of Appeal reviewed the jury's finding of employer negligence exercising the broad scope of appellate review of *law and fact* that it is empowered to exercise by the *Louisiana Constitution* in *all* other civil cases.

The testimony taken at the trial of this matter is replete with evidence that Taylor's Welding Service, Inc., plaintiff's employer, made *no effort whatsoever* to inspect the premises on which plaintiff was working in order to insure that its employees (including plaintiff) were given a safe place to work. The jurisprudence is so well-established as to require no citation of authorities that a Jones Act employer has an affirmative duty to provide his employees with a safe place in which to work.

The record conclusively establishes that Taylor *never even saw* the M/V STATE RACE, much less made any

attempts to insure its safety as a working place for its employees (see Tr. pp. 32, 43, 187), despite the fact that he could easily have done so and could have easily given safety instructions to insure the proper mooring of the vessel (Tr. p. 202). Alternatively, if there was no way that the mooring of the vessel could be accomplished safely, at the very least the employer had an affirmative duty to warn its employees that the premises could not be made safer and thus warn them of the hazardous condition aboard the STATE RACE.

In view of Taylor's complete and absolute disregard for whether or not its employees had a safe and adequate place to work, it is difficult to see on what basis the Court of Appeal relied in reversing the jury's finding of negligence on the part of Taylor's Welding Service, Inc.

Apparently the appellate court determined to relieve Taylor of liability for its negligence on the basis of the employer having delegated the duty to plaintiff to provide for his own safety and for the safety of the welding crew. But, if such a delegation of the employer's duty were allowable and if such a theory were allowed to defeat plaintiff's recovery herein, which we respectfully submit that it is not as will be discussed more fully in this application, then the employer would in effect be telling his employees to look out for their own safety and that he was thereby relieving himself of responsibility for their safety. To allow such a theory to defeat plaintiff's recovery would be in effect allowing the Jones Act employer to *force* his employees to assume *any* risks of unsafe premises, no matter how unsafe and no matter how grossly negligent the employer had been in failing to remedy the situation.

The Louisiana Court of Appeal is saying that the employer was not negligent because it didn't inspect the working premises and therefore wasn't *aware* of the hazardous conditions, i.e. the improper mooring of the vessel, at the time of the accident. The fact that Taylor himself wasn't aboard the vessel and that he hadn't taken the time to inspect the vessel or to see that instructions for proper mooring were given should not relieve the employer of its liability for plaintiff's injuries. Indeed that failure to inspect and the clear breach of that non-delegable duty to provide a safe place to work is more than ample evidence to support the jury's finding that Taylor's Welding Service, Inc. was negligent. Again, as discussed previously herein, the jury's finding of evidence of *any negligence, no matter how slight,* which played *any part whatsoever* in the employee's injury is sufficient to hold the employer liable for these injuries. The testimony as outlined above more than adequately demonstrates that the jury was indeed justified in finding Taylor's Welding Service, Inc. negligent.

The Louisiana Court of Appeal at page 10 of its opinion, after having concluded improperly that there was no evidentiary basis for the jury's conclusion that Taylor was negligent, went further to substantiate and fortify its reversal by holding that Taylor *delegated* to the plaintiff the duty to provide himself and his crew with a safe place to work. (App. p. 13a) This reasoning goes directly against the grain and violates the entire theory of the Jones Act to provide recovery against employers when the employee is injured through his employer's negligence. The court in effect has allowed the employer to avoid Jones Act liability by placing the duty to provide a safe place to work *on the employees themselves.*

It has long been established in the jurisprudence that the duty to provide a Jones Act employee with a safe place to work is *non-delegable* and is *continuing*. In the early case of *Wychgel* v. *States S.S. Co.*, 296 Pac. 863, 135 OR 475, cert. den. 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533, the court made the following statements at 296 p. 867-868:

> "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe."
>
> "He has a right to look to the master for the discharge of that duty and, if the master sees fit to have it attended to by others, that does not change the measure of his obligation to the employee or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects."
>
> "*The employer is found to provide a reasonably safe place in which the employee is to work. This is a positive duty resting upon him. It is one which he may not avoid by turning it over to some employee.* There is no guaranty by the employer that the place shall be absolutely safe. He is bound to take reasonable care and make a reasonable effort, and the greater the risk which attends the work to be done the more imperative is the obligation resting upon him. Patton v. Texas & Pac. Ry. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361; Baltimore & Potomac R. Co. v. Mackey, 147 U.S. 72, 87, 15 S.Ct. 491, 39 L.Ed.

624; Texas & Pac. Ry. Co. v. Archibald, 170 U.S. 665, 669, 18 S.Ct. 777, 42 L.Ed. 1188; The Thomas Cranage (D.C.) 189 F 1003." (Emphasis ours)

The same rules have been espoused in *Cleveland-Cliff's Iron Co.* v. *Martini*, 96 F.2d 632, 633-634, cert. den. 59 S.Ct. 65, 305 U.S. 605, 83 L.Ed. 384 (6th Cir., 1938), and in *Epling* v. *M. T. Epling Co.*, 435 F.2d 732, 736 (6th Cir. 1970).

In David M. Bell's case, these same principles apply and similarly the same reason for disallowing the employer's delegation of his duty to provide a safe place to work is applicable. The employer's positive duty must be fulfilled *by the employer* and that duty may not be shifted, delegated or escaped by the employer under any circumstance. We again emphasize the calamitous result that would be inevitable should such a delegation of the duty be allowed. Jones Act employers would quickly learn that all they need do to avoid liability to their employees would be to tell those employees to look out for their own safety and to provide for themselves a safe place to work. This most unfortunate situation must not be allowed to develop, and can only be avoided by this court granting a writ of certiorari and overruling the Louisiana Supreme Court's and Third Circuit Court of Appeal's action in allowing such a delegation of the employer's duty.

VIII.

CONCLUSION

The Louisiana Supreme Court and Third Circuit Court of Appeal have in this case severely strained and improperly limited the rights of plaintiff-applicant, David M.

Bell under the Jones Act, 46 USC 688, and indeed have eroded the Congressional intent behind the Act by its narrow and niggardly construction thereof. The court has in effect applied to this Jones Act case, not the very limited scope of appellate review as in federal courts, but rather the very broad scope of appellate review of both law and fact which the state courts of appeal are empowered to exercise under the Louisiana Constitution. The federally protected rights of the seaman, David M. Bell, under the Jones Act have been virtually trampled upon.

The lower court's view that there is no reasonable evidentiary basis for the jury's finding of negligence by Taylor's Welding Service, Inc. is unfounded, and has no basis in the record. The lower court's action in disregarding the jury's verdict and substituting its own judgment is manifestly erroneous and contrary to the law and evidence and, more importantly, to the intent of the enactors of the Jones Act.

The state court seems to run rampant in disregarding the jurisprudence, both federal and state, in deciding this case. It substitutes its own facts and its own law to determine the outcome by allowing the defendant Jones Act employer to delegate and shift and therefore avoid its duty to provide a safe place for its employees to work.

We therefore respectfully submit that in this case, just as in *Rogers* v. *Mo. Pac. R.R. Co.*, supra, special and important reasons for the grant of certiorari are certainly present herein where the Louisiana Supreme Court and the Louisiana Third Circuit Court of Appeal have attempted by a narrow and niggardly construction of the Jones Act to deprive David M. Bell of his federally

protected right to a jury determination under the Jones Act standard of employer negligence.

Respectfully submitted,

Robert M. McHale
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Post Office Drawer M
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_____

Glenn W. Alexander

_____

Robert M. McHale

CERTIFICATE

I hereby certify that three copies of the foregoing petition for writ of certiorari to the United States Supreme Court have this day been mailed, postage prepaid, to opposing counsel as follows:

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Cameron, Louisiana, this ____ day of January, 1975.

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APPENDIX "A"

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

DAVID M. BELL, THE NORTH WEST INSURANCE CO.

versus No. 55,333

TAYLOR's WELDING SERVICE, INC., ET AL

October 24, 1974

In re: David M. Bell applying for certiorari, or writ of review, to the Court of Appeal, Third Circuit, Parish of Cameron

Writ denied. The judgment of the Court of Appeal is correct.

/s/ WFM
/s/ JWS
/s/ FWS
/s/ JAD
/s/ PFC

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
October 24, 1974

/s/ Phil Trice
Deputy Clerk

APPENDIX "B"

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

DAVID M. BELL
Plaintiff & Appellee

versus No. 4589

NATIONAL BOAT CORPORATION, ET AL.
Defendants & Appellants

Appeal from the Fourteenth Judicial District Court for the Parish of Cameron, Judge Cecil C. Cutrer presiding

Before Hood, Culpepper and Miller, Judges

Culpepper, Judge

The plaintiff, David M. Bell, filed this suit for damages for personal injuries under the Jones Act and general maritime law. He named as defendants National Boat Corporation, the owner of the vessel on which he was working at the time he sustained the injury, and Taylor's Welding Service, Inc., his employer at the time of the accident. Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer for the sum of $26,290, plus an additional sum up to $3,710 to be paid in the event Bell failed to recover the total of these sums from Taylor.

In the trial in the district court, a jury returned a verdict in favor of plaintiff and against defendant, Taylor's Welding Service, Inc., for the sum of $36,000. Taylor's third party demand against National Boat Corporation was rejected because the jury found the vessel seaworthy and found no negligence by National Boat Corporation or its captain. The district court entered judgment on the jury verdict, denying Taylor and its insurer any credit for the amount received by plaintiff in his settlement with National Boat Corporation. The district judge also rejected the claim of Taylor's insurer for reimbursement of $3,710 paid to plaintiff in workmen's compensation benefits, but recognized Taylor's insurer's claim for the sum of $3,058.72 paid to plaintiff for medical expenses and cure.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third party demand against National Boat Corporation. The intervenor, North-West, appealed from the judgment rejecting its claim for reimbursement for workmen's compensation payments.

The decisive issues are: (1) Was the plaintiff a seaman? (2) Was Taylor's Welding Service, Inc. an employer under the Jones Act? (3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor contracted to do certain welding repair work on a production platform of Mobil Oil Corporation, about 40 miles off the shore of Cameron Parish, Louisiana. Under the agree-

ment, Taylor furnished the necessary labor, equipment and supplies to perform the welding. Mobil Oil supplied the vessel to transport Taylor's crew to the platform, the vessel to be available to Taylor's crew for living quarters and as a base for the repair work, some of which was near and below water level on the platform.

Taylor designated plaintiff as foreman of the welding crew, which consisted of a welder and a helper. Mobil gave plaintiff instructions as to the work to be done. Mobil also contracted with National Boat Corporation to supply the vessel, State-Race, and a crew consisting of a captain, an engineer and a deckhand.

Under Bell's supervision, Taylor's welding crew and all of their equipment and materials were loaded onto the State-Race in Cameron, Louisiana at the Mobil docks. A diving crew, not furnished by Taylor and not under Bell's supervision, also boarded the vessel with its equipment. The vessel proceeded to the platform. As foreman of Taylor's crew, plaintiff advised the captain where he wanted the vessel positioned to perform the welding. The diving crew also advised the captain as to the position in which it desired the vessel to be moored for its work. The method of mooring the vessel in those positions was under the sole control of the captain.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located 6 to 8 feet forward of the stern. The hawser ran aft 25 or 30 feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming.

Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had been in progress for two or three days when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welder on the platform. For about 45 minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, a wave caused the stern of the vessel to drop, and the hawser came over the starboard rail and struck plaintiff on the leg, causing a fracture.

The evidence shows that the swells in the gulf had been running approximately three to four feet in heighth. No difficulty had been experienced with the hawser prior to the accident. The swell that came in immediately before the accident was larger than usual, and this is what caused the stern of the vessel to drop and allow the mooring line to come over the starboard rail.

Before discussing the issues, it is appropriate to state the scope of our appellate review. In civil cases involving state law, the appellate courts of Louisiana have constitutional authority to review both the law and the facts. However, a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, an appellate court cannot disturb the finding of fact of a trial jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion. See Trahan v. Gulf Crews, Inc., La., 255 So.2d 63 (1971) and the cases cited.

WAS PLAINTIFF A SEAMAN?

The first issue is whether the plaintiff was a seaman within the meaning of the Jones Act, 46 USCA 688. The recent case of Barrios v. Louisiana Construction Materials Company, 465 F.2d 1157 (5th Cir. 1972) states the three traditional requirements for qualification as a seaman: (1) There must be a vessel in navigation. (2) The individual must have a more or less permanent connection with the ship. (3) The capacity in which the individual is employed, or the duties which he performs, must contribute to the function of the vessel or to the accomplishment of its mission.

Under these tests, we have little difficulty in concluding that the plaintiff in the present case was a seaman. The State-Race was a vessel in navigation. The plaintiff was living and working on the vessel during the performance of his duties as foreman of the welding crew. The duties which plaintiff was performing contributed to the function or mission of the vessel, which was to assist in the repair of the platform. There was clearly sufficient evidence to support the jury finding that plaintiff was a seaman under the Jones Act.

WAS TAYLOR A JONES ACT EMPLOYER?

In Barrios v. Louisiana Construction Materials Company, supra, the court recognizes there is a substantial conflict in the cases from Federal appellate courts on the question of whether a Jones Act employer must have control of the operation of the vessel to which the injured seaman was attached. Some cases hold that a Jones Act employer must have operational control of the vessel.

Other cases allow Jones Act recovery against an employer who does not own or control the vessel but controls only the operation which resulted in the seaman's injury. In Barrios, the court allowed Jones Act recovery, even though the jury found that the employer did not have operational control over the vessel.

The facts in Barrios were that Williams-McWilliams contracted with The Greater Lafourche Port Commission to construct a flood protection levee. Williams-McWilliams leased a 90-ton dragline from Louisiana Construction Materials Company. The plaintiff, Barrios, had been an oiler on the dragline for Louisiana Construction, so Williams-McWilliams employed Barrios to continue those duties. The dragline was transported to the construction site on a barge owned and controlled by Louisiana Construction. The barge was not leased to Williams-McWilliams.

The barge remained at the work site and was used to furnish oil, fuel, equipment and other services for the dragline. While the dragline was operating on the shore, about 500 feet from the barge, it became bogged down in mud. The barge was sent back to secure a second dragline to pull the bogged dragline out of the mud. After the second dragline had been loaded on the barge, and the spuds at each end of the barge were being lifted, one of the spud cables became fouled. While physically pulling on the fouled cable, Barrios sustained an injury to his back.

The jury found that Barrios was a member of the crew of the barge and was a seaman, that he was injured on the barge while in the course of his employment by Williams-McWilliams, that Williams-McWilliams was negligent,

and that this negligence was a cause of Barrios's injuries. Based on these findings, judgment was entered against Williams-McWilliams under the Jones Act.

However, the jury also found that Louisiana Construction Materials Company was the operator of the barge and thus liable to Barrios under the general maritime law, because of the unseaworthiness of the barge. Williams-McWilliams argued that since the jury found it was not the operator of the barge, it could not be liable under the Jones Act. The court held that although Louisiana Construction had control over the barge, Williams-McWilliams had control over the operations which resulted in injury to Barrios, and this is sufficient to support Jones Act liability.

We are unable to distinguish Barrios from the present case. In its brief, Taylor states that in Barrios, Williams-McWilliams had leased the spud barge from Louisiana Construction, and therefore had control of the vessel, whereas in the present case Mobil Oil had leased the State-Race and Taylor had no control whatever over the vessel. As we read the Barrios decision, it clearly states (465 F.2d 1164) that Williams-McWilliams had leased only the dragline and had not leased the barge, which was being towed by Louisiana Construction's tug and was under the control of Louisiana Construction. The present case and Barrios are therefore the same in that plaintiff's employer was not in control of the vessel.

We conclude that under the Barrios decision the defendant Taylor in the present case was a Jones Act employer.

WAS TAYLOR NEGLIGENT?

The next issue is whether Taylor was guilty of negligence which was a cause of the accident. The district judge's charge to the jury correctly states the law on employer negligence under the Jones Act as follows:

> "We next turn to the question of whether the employer, Taylor's Welding Service, was negligent within the meaning of the Jones Act.
>
> "In order to recover, the plaintiff must prove that the employer was negligent. And the first question you must consider therefore is: What is negligence?
>
> "Negligence is the doing of some act that a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do, under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances.
>
> "The mere *occurrence* of an accident, of course, does not raise any presumption of negligence.
>
> "The obligation of an employer under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employee. The word 'negligence' therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to

seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed, through its officers, agents or employees, some negligent act or omission that played any part, no matter how small, in actually bringing about the injury to David Bell, then you should find that the employer was negligent.

"Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a legal duty to provide their employees with a safe place in which to work. If you find that in this case the plaintiff was injured because the defendant failed to furnish him with a reasonably safe place to work and that the plaintiff's working conditions could have been made safe through the exercise of reasonable care, then you may find that the defendant was negligent.

"In addition to proving that the employer was negligent as I have previously explained, David Bell must prove that such negligence was a contributing cause of the accident. This brings up the law of 'causation'.

"Under the Jones Act, an injury is considered caused by an act, or failure to act, when it appears, from a preponderance of the evidence in the case, that the negligent act or omission, played any part, no matter how small, in bringing about or actually causing the injury."

The evidence shows that Larry Taylor negotiated the contract with Mobil Oil Corporation to repair the offshore platform. Under the agreement, Mobil Oil provided the vessel, State-Race, to transport the men and equipment to the platform and to serve as living quarters and a place of work for the Taylor crew. Plaintiff contends Taylor knew or should have known his employees would be performing work aboard the vessel, and knew or should have known it would be necessary for the plaintiff to stand on the stern of the vessel to supervise the work. It is plaintiff's position that Mr. Taylor knew or should have known that the vessel would be moored to the platform and he should have given special instructions to the captain to moor the vessel in such a manner as to prevent the mooring lines from coming over the rail, or he should have provided special equipment to protect his employees against this hazard.

Taylor's contention is that he delegated to plaintiff the duty to take all necessary precautions for the safety of Taylor's employees. The evidence shows that plaintiff was a competent and experienced oilfield worker. He had been engaged in oilfield work for approximately 40 years, the last 15 years of which he worked for Mobil Oil as a field foreman, and much of this last 15 years being devoted to offshore work. Plaintiff had retired from Mobil at the age of 62 and gone to work as a welding foreman for Taylor. During the negotiations, Mobil indicated it would like to have plaintiff supervise Taylor's work on the platform because Mobil knew plaintiff was well qualified.

Plaintiff's own testimony shows he understood he was in complete charge of the job, including the safety of the

crew, and he felt he was capable of handling any situation that arose. Plaintiff testified as follows:

"Q I see. Did you consider it necessary for Mr. Taylor to give you any instructions as to checking the safety of this boat, STATE RACE?

"A Mr. Taylor and I had worked on similar jobs a number of times. We were both acquainted with the job, and it was kind of — just like you don't need any instructions to do your job.

"Q Yes sir.

"A Well, that's the way I was.

"Q Thank you. Well, do I — I gather from what you have just said, you felt you were just as capable as Mr. Taylor to handle any situation that arose?

"A I think that's correct; unless it concerns some technical part of welding that I wasn't versed on.

"Q And to particularly handle any question as to safety?

"A That's right."

We find no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent. Taylor delegated to plaintiff, a competent and experienced foreman, the duty to take any precautions necessary for the safety of the welding crew. There is no evidence that plaintiff could not or did not perform his duties as to safety. There is no evidence that the vessel was improperly moored. There is no evidence as to any type of special equipment which could have been secured by Taylor or by plaintiff to prevent the hawser from coming over the rail. In the absence of any evidence as to special mooring or special equipment which could have been used to prevent the accident, how can it be concluded that Taylor was negligent in failing to furnish such safety precautions?

Having concluded there is no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent, it is unnecessary for us to consider whether plaintiff was contributorily negligent or any of the other issues in the case.

For the reasons assigned, the judgment appealed is reversed and set aside. It is now ordered, adjudged and decreed that there be judgment herein in favor of the defendant, Taylor's Welding Service, Inc., rejecting plaintiff's demands at his cost. All costs of this appeal are assessed against the plaintiff appellee.

REVERSED AND RENDERED.

APPENDIX "C"

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

* * * *

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances. machinery, track, roadbed, works, boats, wharves, or other equipment.

Apr. 22, 1908. c. 149, § 2, 35 Stat. 65.

* * * *

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover

damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

* * * *

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1002

TAYLOR'S WELDING SERVICE, INC., ET AL.,
Petitioners,

versus

DAVID M. BELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 1974

No.

TAYLOR'S WELDING SERVICE. INC.. ET AL..
Petitioners.

versus

DAVID M. BELL.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

MAY IT PLEASE THE COURT:

The petition of Taylor's Welding Service. Inc.. defendant and third party plaintiff: the North-West Insurance Company. defendant and intervenor: Industrial Fire & Casualty Company and David Babbington Hill. Underwriter at Lloyd's London. London. England. defendants. for writ of certiorari to be directed to the Supreme Court of Louisiana. with respect represents that:

1.

Petitioners present this application pursuant to an order of the Court granting until and through

February 6, 1975, to file the same, all subject to further review of the Court as to the right of respondents to have been granted additional time.

2.

Petitioners present this application in the alternative and only in the event the Court should grant the application of respondent, (No. 74-889), David M. Bell for a writ of certiorari to be directed to the Supreme Court of Louisiana. In such event, petitioners' request as hereinafter set forth that this court review certain erroneous findings made by the Court of Appeal, Third Circuit, State of Louisiana and pass on certain issues that the Court of Appeal, Third Circuit, did not decide because of its decision in favor of petitioners. The Supreme Court of Louisiana as will hereinafter appear denied the application of all parties litigants for writs of certiorari to be directed to the Court of Appeal, Third Circuit, State of Louisiana.

OPINIONS BELOW

The judgment of the Supreme Court of Louisiana dated October 24, 1974 denying the application of respondent, David M. Bell for a writ of certiorari, or writ of review, to the Court of Appeal, Third Circuit, State of Louisiana is reported at 302 So.2d 27; The Judgment of the Supreme Court of Louisiana dated October 24, 1974 denying the application of petitioners, Taylor's Welding Service, Inc., the North-West Insurance Company, Industrial Fire & Casualty Company and David Babbington Hill, for a writ of certiorari to the Court of Appeal, Third Circuit, State of

Louisiana, because of the Court's denial of respondent's writ application aforementioned is reported at 302 So.2d 27.

The opinion of the Court of Appeal, Third Circuit, State of Louisiana dated July 29, 1974, reversing the jury verdict in favor of plaintiff against designated petitioners and granting judgment in favor of designated petitioners and against plaintiff is reported at 298 So.2d 327; the Court of Appeal denied applications of both petitioner and respondents for rehearings on August 21, 1974 as will appear from the attached Appendix "A".

JURISDICTION AND STATUTES INVOLVED

The statutes involved are: The Jones Act, 46 U.S.C. 688 and the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, et seq.

QUESTIONS PRESENTED FOR REVIEW

1.

Was respondent, David Bell, who was strictly an offshore worker who performed his work generally on stationary offshore platforms and who had no permanent connection with M/V State Race on which he was injured, a seaman within the contemplation of the Jones Act?

2.

Was Taylor's Welding Service, Inc. the employer of respondent, David Bell, who had no connection with and who did not own, charter, operate or control the vessel on which petitioner was injured, an employer

within the contemplation of the Jones Act?

3.

In the event Taylor's Welding Service, Inc. was negligent, was respondent, David Bell, who had absolute and complete control of the operation being performed contributorily negligent?

4.

In the event respondent, David Bell, is entitled to recover any amount from Taylor's Welding Service, Inc., is Taylor then entitled to recover on its third party demand against National Boat Corporation based on negligence all of that amount plus attorneys fees or part of that amount plus attorneys fees?

5.

In the event respondent, David Bell, is entitled to recovery against Taylor's Welding Service, Inc., is Taylor then entitled to full credit for the amount of $26,290.00 paid by National Boat Corporation by way of settlement to respondent, David Bell?

6.

In the event respondent, David Bell, is entitled to recover from Taylor's Welding Service, Inc., then is the North-West Insurance Company, the compensa-

tion insurer for Taylor's Welding Service, Inc. entitled to recover from petitioner David Bell on its intervention the amount of $3,710.00 paid by it to respondent as compensation under the Longshoremen's and Harbor Workers' Act as extended?

STATEMENT OF THE CASE

A.

On March 19, 1973, David M. Bell (plaintiff) filed suit for damages in the District Court for Cameron Parish against his employer, Taylor's Welding Service, Inc. and the National Boat Corporation. The relief sought against Taylor was under the Jones Act and general maritime law; the relief against National Boat was under the general maritime law. By appropriate pleadings: plaintiff named the liability insurers of Taylor as additional defendants; the North-West Insurance Company, Taylor's workmen's compensation insurer, intervened to recover the workmen's compensation benefits paid to the plaintiff; Taylor named National Boat as a third party defendant to recover in full or in part, including attorneys fees, any damages that might be assessed against it.

B.

Plaintiff was a highly competent and experienced oil field worker, who at the time of the trial was approximately 65 years of age; he had been engaged in oil field work for the Mobil Oil Corporation for ap-

proximately 40 years when he retired on November 1, 1971; during the last 15 years that he worked for Mobil he worked in the capacities of field foreman and construction foreman; about one-half of the last 15 years was devoted to offshore work.

Plaintiff immediately after his retirement on November 1, 1971, went to work as a welding foreman for Taylor's Welding Service, Inc., a business principally owned by Larry Taylor and engaged in supplying crews to perform offshore welding services primarily for oil companies; plaintiff continued to work in that capacity for Taylor until his accident of March 11, 1972. Larry Taylor had known the plaintiff for five or six years and knew of his competence and ability as an offshore supervisory employee. Taylor's Welding Service, Inc. in November of 1971 was doing work for Mobil; Mobil indicated that it would like to have plaintiff employed by Taylor to do the work because of plaintiff's "know how" of the work to be done.

Mobil contracted with Taylor to make certain repairs to Mobil's stationary platform located in the Gulf of Mexico some 45 miles off the shore of Cameron Parish, Louisiana, with Taylor to furnish the necessary supervision and labor, the welding equipment, supplies and prefabricated structural material; Mobil engaged the National Boat Corporation (not clear from respondent's application) to supply it with a vessel and a crew to transport Taylor's men to the platform, the vessel to be available to Taylor's crew for living quarters and also to be used as a base for

some of the work to be done by Taylor's crew and diving crew. National Boat for these purposes provided the M/V State Race and crew consisting of a captain, engineer, and deck hand. *The captain of the State Race was solely and completely in charge of its operation.*

Plaintiff boarded the State Race at the Mobil dock in Cameron, Louisiana, early on the morning of March 9, 1972. He took no part in the loading of Taylor's equipment, supplies and prefabricated structural material other than to direct that they be placed on the vessel so that they could be easily unloaded; during the trip to the platform, plaintiff was solely on the vessel as a passenger.

The State Race arrived at Mobil's platform at about ten or eleven o'clock that morning; Taylor's equipment was unloaded from the State Race to the platform. The State Race was moored to the platform, the plaintiff showing the Captain where to moor it so it would be convenient for the work to be done. Plaintiff had nothing, whatsoever, to do with the method and manner in which the State Race was moored. Thereafter the State Race was not moved from its initial mooring position unless it was moved at night and any such movement was done solely by the Captain. *Captain Tommy Suarez of the State Race had complete charge of the method and manner in which the State Race was moored to the platform.*

The accident occurred at approximately 1:30 P.M. on March 11, 1972; approximately for 45 minutes before the occurrence of the accident, plaintiff had been

standing on the State Race directing the work on the stationary platform by the welder, Charles Murphy; at the time of the accident plaintiff was standing approximately one foot from the stern and one foot from the starboard; while in that position he was struck by the mooring line (hawser) that ran from the State Race to the platform. On the morning of March 11th and up to the time of the accident, the swells in the Gulf had been running according to plaintiff approximately three to four feet; plaintiff did not see the swell that came in immediately before the accident occurred, but he believes that it was a larger than usual swell and that this may have caused the State Race to drop and allow the mooring line to come over the starboard rail and strike him. Plaintiff was taken by helicopter to the Lake Charles Memorial Hospital in Lake Charles; he was treated by Drs. Drez and Akins, orthopedists; his injury was described as a displaced transverse fracture of the middle and distal third of the left femur. At the time of the trial, shortly less than two years following the accident, plaintiff had apparently reached maximum recovery, his chief disability being a partial loss of flexion of his injured leg.

Shortly prior to trial plaintiff settled with National Boat Corporation, reserving his rights against the other parties and agreeing to defend, indemnify and hold National Boat harmless against any claims asserted by Taylor and others against it. The Honorable Cecil C. Cutrer, trial judge, refused defendants' request that plaintiff produce the release given National Boat for inspection and filing in evidence. After the jury retired, Judge Cutrer ordered the

production of the release and the filing of it in the record.

C.

The case was tried to a jury and submitted to it on written interrogatories. The jury found:

1. Plaintiff to be a seaman.

2. Taylor to be negligent and its negligence to be a proximate cause of the accident.

3. Plaintiff was not guilty of any contributory negligence that was a proximate cause of the accident.

4. The vessel State Race was not unseaworthy.

5. National Boat was not guilty of any negligence that was a proximate cause of the accident.

6. The plaintiff suffered damages in the amount of $36,000.00.

Based on the jury's findings, the honorable trial judge rendered judgment as follows:

1. In favor of plaintiff and against Taylor and its insurers in the amount of $36,000.00

with legal interest from date of judicial demand, the amount being subject to a credit of $3,058.72, with legal interest from date of judicial demand for that amount paid plaintiff by Taylor and North-West for medical expenses.

2. Rejecting the claim of intervenor North-West for $70.00 per week, aggregating $3,-710.00 paid by it to the plaintiff.

3. Rejecting the third party demand of Taylor against National Boat.

Although not specifically set forth in the judgment, the honorable trial judge held that Taylor and its liability insurer were not entitled to a credit for the $26,290.00 paid by National Boat to the plaintiff.

D.

Taylor, its liability insurers, and North-West Insurance appealed to the Court of Appeal, Third Circuit, on all issues decided adversely to them.

E.

On July 29, 1974, the Court of Appeal, Third Circuit, handed down a written decision reversing the judgment of the trial court.

F.

Plaintiff timely filed an application for a rehearing on the judgment rendered by the Court of Appeal; Taylor, its liability insurers, and North-West timely filed an application for rehearing on the judgment rendered by the Court of Appeal, Third Circuit — this

application being filed solely to preserve their rights in the event the Court of Appeal did grant plaintiff's application for a rehearing and in the further event of plaintiff filing an application for a writ of review to the Supreme Court of Louisiana; on August 21, 1974, the Court of Appeal, Third Circuit, denied all applications for rehearing without assigning any reason therefor.

G.

As set out hereinbefore in "Opinions Below" all litigants applied to The Supreme Court of Louisiana for writs of certiorari (that of petitioners) being an alternative application and to be granted only in the event plaintiff's application was granted), which applications were denied.

H.

This matter is now before the Supreme Court of the United States on application of respondent David Bell, for a writ of certiorari.

Also attached are:

Appendix "B", Opinion of the Court of Appeal, Third Circuit, State of Louisiana.

Appendix "C", Judgment of the Trial Court.

STAGE IN PROCEEDINGS AND MANNER IN WHICH FEDERAL QUESTIONS WERE PRESENTED

Federal questions were presented by the pleadings, the evidence during trial and the state court appellate arguments.

ARGUMENT

1.

Was respondent, David Bell, who was strictly an offshore worker who performed his work generally on stationary offshore platforms and who had no permanent connection with M/V State Race of which he was injured, a seaman within the contemplation of the Jones Act?

We submit that the Court of Appeal erred in finding plaintiff to be a seaman. Plaintiff was strictly an offshore worker; his work was performed generally on stationary offshore platforms; on this particular assignment of approximately two days duration, he did some of his work on the M/V State Race. *Barrios v. Louisiana Construction Materials Company*, 465 F.2d 1157 (5th Cir. 1972) cited by the Court of Appeal in support of its finding that plaintiff was a seaman states as one of the three traditional requirements for the qualification as a seaman that the worker must have a more or less permanent connection with the ship. The plaintiff had no permanent connection with the ship. *Offshore Company v. Robinson*, 266 F.2d 769 (5th Cir. 1959), the leading case as to the requirements to be classified as a seaman, states that the worker must be assigned permanently to a vessel, or that he perform a substantial part of his work on a vessel. Plaintiff does not meet these requirements. We accordingly submit that he was not a seaman.

2.

Was Taylor's Welding Service, Inc. the employer of respondent, David Bell, who had no connection with and who did not own, charter, operate or control the vessel on which respondent was injured, an employer within the contemplation of the Jones Act?

For a successful Jones action to be brought against the seaman's employer, the seaman must prove by the preponderance of the evidence that his employer owned, chartered, operated or controlled the operation of the vessel, to which the seaman was more or less permanently attached at the time of his injury. See: *Thomas v. Peterson Marine Service, Inc.*, 411 F.2d 592 (C/A 5, 1969); *Gilmore and Black, The Law of Admiralty* (1957), p. 285; Norris, *The Law of Seamen*, (1970). Sec. 670, pp. 310-311, Sec. 687, p. 362; *Williamson v. Daspit Brothers Marine Divers, Inc.*, 219 F.Supp. 370, aff'd. 5 Cir., 337 F.2d 337 (E.D. La. 1964).

The Court of Appeal in holding that Taylor was a Jones Act employer, relied on *Barrios v. Louisiana Constructions Material Company*, 465 F.2d 1157 (5th Cir. 1972) and stated that it could not distinguish the facts therein from those in the case at bar. Here the appellate court fell into error. The Court in *Barrios* stated:

> "As is evident, the cases are in substantial conflict on this point. This, we are con-

> strained to decide this case on its individual facts. On the facts of this case, we think it is clear that Williams-McWilliams is a proper Jones Act defendant even though the jury determined that it did not have operational control over the vessel. The jury found that Barrios was employed by Williams-McWilliams and assigned to duties which bore a sufficiently permanent connection to the spud barge to qualify Barrios as a member of his crew. In addition, the jury found that Williams-McWilliams supervised the particular operations which gave rise to Barrios' injury and that the negligence of Williams-McWilliams was a cause of of the injury. Where the plaintiff has established these traditional elements of a Jones Act recovery, it would be a strained and artificial construction of the Act to impose any additional requirement that the defendant have operational control over the entire vessel."

In *Barrios* the plaintiff was an employee of the general contractor, Williams-McWilliams; Williams-McWilliams was found to be negligent in that one of its supervisory employees over plaintiff knew or should have known that the method of work was unsafe. Although counsel for respondents do not believe the holding in *Barrios* is correct under the jurisprudence, the Court therein did hold that plaintiff's employer was in control of the operation being performed when he was injured. The holding was thus obviously based

on control exercised by plaintiff's employer. That is a distinguishing feature from the facts in the case at bar. In the case at bar, admittedly, there was no supervision and control by defendant Taylor of the operation being performed when plaintiff was injured other than that executed by plaintiff. In *Barrios* at the time of the accident the work was being done to the spud barge so that it could be moved. In the case at bar, the work being done was to the stationary platform, where work was being supervised by the plaintiff.

The following are distinguishing features between *Barrios* and the case at bar:

Barrios	*Case at Bar*
1. Williams-McWilliams, the general contractor, had leased the spud-barge from Rappelet, which was analgous to being a charterer thereof.	1. Mobil Oil had leased or chartered the M/V State Race and its crew from National Boat. There was no relationship, contractual or otherwise, between defendant, Taylor and National Boat and/or the M/V State Race.
2. Williams-McWilliams was directly in charge of the operation being performed when the plaintiff was injured.	2. Plaintiff was in complete control of the operation being performed when he was injured.
3. The particular operation being performed when the plaintiff was injured was work being done to the spud-barge.	3. The particular operation being performed when plaintiff was injured was for the repair of the stationary platform.
4. The plaintiff's injury was caused by the negligence of supervisory employees of Williams-McWilliams.	4. Plaintiff's injury was caused by his negligence and/or unseaworthiness of the M/V State Race.

For a similar analysis of the *Barrios* case see Vol. 2, Norris, *Law of Seamen*, Section 670, *The Employer-Employee Relationship*, Page 93 of the 1973 Pocket Part.

Succinctly stated the Court of Appeal was in error in holding that there was any control on the part of Taylor over the M/V State Race; the operation of the M/V State Race was being controlled by its captain, Tommy Suarez, who had the duty to maintain the mooring of the M/V State Race; *the only operation of which it could be said that Taylor had control was the operation being performed by the plaintiff, and that operation was for the repair of the stationary platform.*

In *Callahan v. Fluor Ocean Services, Inc.*, 482 F.2d 1350 (C.A., 5th — 1973) the Court in commenting on the Barrios case emphasized that there must be control on the part of the seaman's employer in order to establish Jones Act liability and stated:

> "Control of the operation during which an injury is sustained may sometimes suffice to establish Jones Act liability."

We accordingly submit that Taylor was not a Jones Act employer.

A corollary to this assignment of error is the erroneous and misleading instructions given by the trial judge with reference to a Jones Act employer and his failure to give certain instructions requested by Taylor in that respect. As pointed out in petitioner's appellate briefs, the jury under the trial court's instructions could not do anything but find that Taylor was a Jones Act employer. This resulted in imposing a

greater duty on Taylor than required by law. Such instructions were also presented so as to find liability on the part of Taylor if Taylor committed "some negligent act or omission that played any part, no matter how small, in actually bringing about the injury to David Bell * * * *" This was an improper instruction as to Taylor who, as a matter of law, was not a Jones Act employer. Taylor, as not a Jones Act employer, owed plaintiff only a duty of ordinary care.

3.

In the event Taylor's Welding Service, Inc. was negligent, was respondent, David Bell, who had absolute and complete control of the operation being performed contributorily negligent?

Although it is impossible to glean any negligent act from the evidence on the part of Taylor, if there was any such act, it was completely that of the plaintiff because he was in full charge of the work being done by Taylor. If there was any unseaworthiness related to the M/V State because of the manner in which it was moored, or was being handled, then plaintiff, a highly competent offshore worker, should have observed it. No citation is needed to support the statement that a person who performs his work through an agent and may be vicariously liable to another because of the agent's negligence, is not responsible to the agent whose negligence was the sole and proximate cause of his own accident.

4.

In the event respondent, David Bell, is entitled to recover from Taylor's Welding Service, Inc., is Taylor then entitled to recover on its third party demand against National Boat Corporation based on negligence all of that amount plus attorneys fees or part of that amount plus attorneys fees?

Of course, we admit that the mere happening of an accident does not ordinarily create an inference that negligence was present. However, the manner in which plaintiff's accident occurred does raise a presumption that it would not have occurred unless negligence on the part of the person in charge of the operation of the State Race had been negligent. Captain Suarez was in complete charge of the mooring of the State Race; it was up to him and solely up to him to determine if it was moored safely; it was up to him as Captain with his many years of experience in such mooring operations to determine if it was foreseeable that an ordinary swell or a greater than usual swell of the Gulf would cause the mooring line to rise above the starboard rail and strike the plaintiff. It was negligence for him not to do so. Even if there was no negligence, the mooring of the State Race caused the vessel to be unseaworthy. The duty to furnish a seaworthy vessel is absolute and nondelegable. If the vessel is unseaworthy, it is immaterial whether the vessel owner was negligent or knew about the un-

seaworthy condition. *Mitchell vs. Trawler Racer, Inc.*, 362 U.S. 1860.

It is inescapable that the active and dominant cause of the accident was the negligence of National Boat in providing an unsafe and unseaworthy vessel. The negligence was National Boat's failure to moor the M/V State Race so that a swell in the Gulf, maybe a little more than usual, would not cause the mooring line to jump over the starboard rail and strike the plaintiff. This was also an unseaworthy condition of the M/V State Race. The negligence, if any, of Taylor was passive; the negligence of National Boat was active. See *Tri-State Oil Tool Industries, Inc. vs. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir., 1969) as authority for granting recovery in favor of a tortfeasor guilty of only passive negligence, or having only a vicarious responsibility against a tortfeasor guilty of active negligence. It follows that North-West is entitled to recover on its intervention against National Boat.

5.

In the event respondent, David Bell, is entitled to recovery against Taylor's Welding Service, Inc., is Taylor then entitled to full credit for the amount of $26,290.00 paid by National Boat Corporation by way of settlement to respondent, David Bell?

Billiot vs. Sewart Seacraft, Inc., 382, F.2d. 662 (5th Cir., 1967) provides the answer to this question. The

Billiot case involved a very similar set of facts; therein the plaintiff, a seaman's widow, sued the seaman's employer, the owner of a crew boat, and the owner of the barge on which the accident occurred; plaintiff compromised her claims against the barge owner and released it reserving her rights against the owner of the crew boat. The Fifth Circuit reversed the summary judgment rendered by the trial court in favor of the crew boat owner, remanded the case, holding that the widow had properly reserved her rights against the crew boat owner, and further stated that the proper manner to handle the release was to withhold it from the jury, allow the jury to determine the total damages due the plaintiff and then the trial judge to deduct the amount paid plaintiff for the release from the amount of the verdict. Also for affirmation of this principle, see *Loffland Brothers Company vs. Huckabee*, 373 F.2d 528 (5th Cir., 1967).

6.

In the event respondent, David Bell, is entitled to recover from Taylor's Welding Service, Inc., then is the North-West Insurance Company, the compensation insurer for Taylor's Welding Service, Inc. entitled to recover from respondent, David Bell on its intervention the amount of $3,710.00 paid by it to plaintiff as compensation under the Longshoremans' and Harbor Workers' Act as extended?

Again, we urge that no citation other than the Longshoremen's and Harbor Workers' Act is necessary.

CONCLUSION

Because this is an application for an alternative writ of certiorari, counsel for petitioners requests that the petition of David Bell for a writ of certiorari be denied so there will be no necessity to consider this application.

If the Court grants the application of respondent, David Bell, even though it may ultimately deny the same, the Court is requested to grant this alternative application, in advance of the final decision on the application of respondent, David Bell, so that the arguments on both writs may be submitted at the same time.

In further conclusion for the foregoing reasons, counsel for petitioners submits that:

1. Respondent David Bell was not a seaman.
2. Taylor's Welding Service, Inc. was not a Jones Act employer.

3. In the event Taylor's Welding Service, Inc. was negligent, this resulted solely from the negligence of respondent, David Bell.

4. In the event respondent, David Bell is granted recovery against Taylor's Welding Service, Inc. then Taylor is entitled to recover in full or part with attorney's fees on its third party demand based on negligence against National Boat Corporation. North-West is entitled to recover on its intervention against National Boat.

5. In the event respondent, David Bell is granted recovery against Taylor's Welding Service, Inc., then Taylor is entitled to a credit of $26,290.00 being the amount paid to respondent, David Bell in settlement by National Boat Corporation.

6. The North-West Insurance Company is entitled to reimbursement from respondent, David Bell of $3,710.00 being the amount paid by it to him for workmen's compensation under the Longshoremen's and Harbor Workers' Act, as extended.

Respectfully submitted.

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Taylor's Welding Service, Inc.,
The North-West Insurance Company and Industrial Fire &
Casualty Company

STATE OF LOUISIANA
PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally appeared Frank M. Brame, who after being duly sworn, declared that he is of counsel for the petitioners in the foregoing petition for a writ of certiorari and that all allegations in the foregoing petition are true and correct.

/s/ FRANK M. BRAME
FRANK M. BRAME

SWORN TO AND SUBSCRIBED BEFORE ME on this 4th day of February, 1975.

/s/ JOE A. BRAME
NOTARY PUBLIC

CERTIFICATE

I hereby certify that I this day, February ____, 1975, mailed via U.S. mail, proper postage affixed 3 copies of the foregoing petition to each: Jones & Jones, Attorneys at Law, P. O. Box M, Cameron, Louisiana, Glenn Alexander, Attorney at Law, P. O. Box M, Cameron, Louisiana, Robert M. McHale, Attorney at Law, 1901 Oak Park Boulevard, Lake Charles, Louisiana, attorneys for David M. Bell; and Louis M. Bufkin, Attorney at Law, 1901 Oak Park Boulevard, Lake Charles, Louisiana, attorney for National Boat Corporation.

Lake Charles, Louisiana.

_____

FRANK M. BRAME

APPENDIX "A"

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
OFFICE OF THE CLERK

Lake Charles, La., August 21, 1974

Dear Sir:

Rehearing was this day refused in the case entitled David M. Bell v. National Boat Corp., et al.

No. 4589

both applications denied.

Cordially yours,
KENNETH J. de BLANC, Clerk

APPENDIX "B"

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

P. O. Box 3000
Lake Charles

Dear Sir:

Attached you will find copy of opinion in a case in which you are an attorney of record.

Your attention is invited to Rule XI of the Uniform Rules of the Courts of Appeal, especially the following sections:

"Section 1. Notice of judgments of the court will be delivered personally, or by certified or registered mail, by the clerk of court to at least one of counsel for each of the parties litigant, and applications for rehearing and briefs in support thereof must be filed in sextuple copies on or before the fourteenth calendar day after, but not including, the date of receipt of such notice; and no extension of time therefor shall be granted. (Emphasis supplied.)

"Section 2. In the case of an application for rehearing sent through the mail for filing, it shall be deemed timely filed when the official U. S. postmark upon the envelope transmitting such application shows that it was mailed on or before the fourteenth calendar day following the date notice of the pertinent judgment was given, as reflected by the records maintained by the clerk of court.

"Section 3. If the applicant for rehearing desires further time for filing of brief in support of his application, he shall request additional time in his application and the court may grant or refuse such delay in its discretion."

Cordially yours,

KENNETH J. de BLANC
Clerk of Court

NUMBER 4589

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

DAVID M. BELL
Plaintiff & Appellee

versus

NATIONAL BOAT CORPORATION, ET AL.
Defendants & Appellants

Appeal from the Fourteenth Judicial District Court for the Parish of Cameron, Judge Cecil C. Cutrer presiding

Before Hood, Culpepper and Miller, Judges

Culpepper, Judge

The plaintiff, David M. Bell, filed this suit for damages for personal injuries under the Jones Act and general maritime law. He named as defendants National Boat Corporation, the owner of the vessel on which he was working at the time he sustained the injury, and Taylor's Welding Service, Inc., his employer

at the time of the accident. Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer for the sum of $26,290, plus an additional sum up to $3,710 to be paid in the event Bell failed to recover the total of these sums from Taylor.

In the trial in the district court, a jury returned a verdict in favor of plaintiff and against defendant, Taylor's Welding Service, Inc., for the sum of $36,000. Taylor's third party demand against National Boat Corporation was rejected because the jury found the vessel seaworthy and found no negligence by National Boat Corporation or its captain. The district court entered judgment on the jury verdict, denying Taylor and its insurer any credit for the amount received by plaintiff in his settlement with National Boat Corporation. The district judge also rejected the claim of Taylor's insurer for reimbursement of $3,710 paid to plaintiff in workmen's compensation benefits, but recognized Taylor's insurer's claim for the sum of $3,058.72 paid to plaintiff for medical expenses and cure.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third party demand against National Boat Corporation. The intervenor, North-West, appealed from the judgment rejecting its claim for reimbursement for workmen's compensation payments.

The decisive issues are: (1) Was the plaintiff a seaman? (2) Was Taylor's Welding Service, Inc. an employer under the Jones Act? (3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor contracted to do certain welding repair work on a production platform of Mobil Oil Corporation, about 40 miles off the shore of Cameron Parish, Louisiana. Under the agreement, Taylor furnished the necessary labor, equipment and supplies to perform the welding. Mobil Oil supplied the vessel to transport Taylor's crew to the platform, the vessel to be available to Taylor's crew for living quarters and as a base for the repair work, some of which was near and below water level on the platform.

Taylor designated plaintiff as foreman of the welding crew, which consisted of a welder and a helper. Mobil gave plaintiff instructions as to the work to be done. Mobil also contracted with National Boat Corporation to supply the vessel, State-Race, and a crew consisting of a captain, an engineer and a deckhand.

Under Bell's supervision, Taylor's welding crew and all of their equipment and materials were loaded onto the State-Race in Cameron, Louisiana at the Mobil docks. A diving crew, not furnished by Taylor and not under Bell's supervision, also boarded the vessel with its equipment. The vessel proceeded to the platform. As foreman of Taylor's crew, plaintiff advised the captain where he wanted the vessel positioned to perform the welding. The diving crew also advised the captain as to the position in which it desired the vessel to be moored for its work. The method of mooring the vessel in those positions was under the sole control of the captain.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located 6 to 8 feet forward of the stern. The hawser ran aft 25 or 30 feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming.

Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had been in progress for two or three days when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welder on the platform. For about 45 minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, a wave caused the stern of the vessel to drop, and the hawser came over the starboard rail and struck plaintiff on the leg, causing a fracture.

The evidence shows that the swells in the gulf had been running approximately three to four feet in heighth. No difficulty had been experienced with the hawser prior to the accident. The swell that came in immediately before the accident was larger than usual, and this is what caused the stern of the vessel to drop and allow the mooring line to come over the starboard rail.

Before discussing the issues, it is appropriate to state the scope of our appellate review. In civil cases involving state law, the appellate courts of Louisiana have constitutional authority to review both the law and the facts. However, a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is

the same as that of the Federal Courts. Under Federal law and jurisprudence, an appellate court cannot disturb the finding of fact of a trial jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion. See Trahan v. Gulf Crews, Inc., La., 255 So.2d 63 (1971) and the cases cited.

WAS PLAINTIFF A SEAMAN?

The first issue is whether the plaintiff was a seaman within the meaning of the Jones Act, 46 USCA 688. The recent case of Barrios v. Louisiana Construction Materials Company, 465 F.2d 1157 (5th Cir. 1972) states the three traditional requirements for qualification as a seaman: (1) There must be a vessel in navigation. (2) The individual must have a more or less permanent connection with the ship. (3) The capacity in which the individual is employed, or the duties which he performs, must contribute to the function of the vessel or to the accomplishment of its mission.

Under these tests, we have little difficulty in concluding that the plaintiff in the present case was a seaman. The State-Race was a vessel in navigation. The plaintiff was living and working on the vessel during the performance of his duties as foreman of the welding crew. The duties which plaintiff was performing contributed to the function or mission of the vessel, which was to assist in the repair of the platform. There was clearly sufficient evidence to support the jury finding that plaintiff was a seaman under the Jones Act.

WAS TAYLOR A JONES ACT EMPLOYER?

In Barrios v. Louisiana Construction Materials Company, supra, the court recognizes there is a substantial conflict in the cases from Federal appellate courts on the question of whether a Jones Act employer must have control of the operation of the vessel to which the injured seaman was attached. Some cases hold that a Jones Act employer must have operational control of the vessel. Other cases allow Jones Act recovery against an employer who does not own or control the vessel but controls only the operation which resulted in the seaman's injury. In Barrios, the court allowed Jones Act recovery, even though the jury found that the employer did not have operational control over the vessel.

The facts in Barrios were that Williams-McWilliams contracted with The Greater Lafourche Port Commission to construct a flood protection levee. Williams-McWilliams leased a 90-ton dragline from Louisiana Construction Materials Company. The plaintiff, Barrios, had been an oiler on the dragline for Louisiana Construction, so Williams-McWilliams employed Barrios to continue those duties. The dragline was transported to the construction site on a barge owned and controlled by Louisiana Construction. The barge was not leased to Williams-McWilliams.

The barge remained at the work site and was used to furnish oil, fuel, equipment and other services for the dragline. While the dragline was operating on the shore, about 500 feet from the barge, it became bogged down in mud. The barge was sent back to secure a sec-

ond dragline to pull the bogged dragline out of the mud. After the second dragline had been loaded on the barge, and the spuds at each end of the barge were being lifted, one of the spud cables became fouled. While physically pulling on the fouled cable, Barrios sustained an injury to his back.

The jury found that Barrios was a member of the crew of the barge and was a seaman, that he was injured on the barge while in the course of his employment by Williams-McWilliams, that Williams-McWilliams was negligent, and that this negligence was a cause of Barrios's injuries. Based on these findings, judgment was entered against Williams-McWilliams under the Jones Act.

However, the jury also found that Louisiana Construction Materials Company was the operator of the barge and thus liable to Barrios under the general maritime law, because of the unseaworthiness of the barge. Williams-McWilliams argued that since the jury found it was not the operator of the barge, it could not be liable under the Jones Act. The court held that although Louisiana Construction had control over the barge, Williams-McWilliams had control over the operations which resulted in injury to Barrios, and this is sufficient to support Jones Act liability.

We are unable to distinguish Barrios from the present case. In its brief, Taylor states that in Barrios, Williams-McWilliams had leased the spud barge from Louisiana Construction, and therefore had control of the vessel, whereas in the present case Mobil Oil had leased the State-Race and Taylor had no control whatever over the vessel. As we read the Barrios deci-

sion, it clearly states (465 F.2d 1164) that Williams-McWilliams had leased only the dragline and had not leased the barge, which was being towed by Louisiana Construction's tug and was under the control of Louisiana Construction. The present case and Barrios are therefore the same in that plaintiff's employer was not in control of the vessel.

We conclude that under the Barrios decision the defendant Taylor in the present case was a Jones Act employer.

WAS TAYLOR NEGLIGENT?

The next issue is whether Taylor was guilty of negligence which was a cause of the accident. The district judge's charge to the jury correctly states the law on employer negligence under the Jones Act as follows:

> "We next turn to the question of whether the employer, Taylor's Welding Service, was negligent within the meaning of the Jones Act.
>
> "In order to recover, the plaintiff must prove that the employer was negligent. And the first question you must consider therefore is: What is negligence?
>
> "Negligence is the doing of some act that a reasonably prudent person would not do, or the failure to do something a reasonably prudent person would do, under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances.

"The mere *occurrence* of an accident, of course, does not raise any presumption of negligence.

"The obligation of an employer under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employee. The word 'negligence' therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed, through its officers, agents or employees, some negligent act or omission that played any part, no matter how small, in actually bringing about the injury to David Bell, then you should find that the employer was negligent.

"Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a legal duty to provide their employees with a safe place in which to work. If you find that in this case the plaintiff was injured because the defendant failed to furnish him with a reasonably safe place to work and that the plaintiff's working conditions could have been made safe through the exercise of reasonable care, then you may find that the defendant was negligent.

"In addition to proving that the employer was negligent as I have previously explained, David Bell must prove that such negligence was a contributing cause of the accident. This brings up the law of 'causation'.

"Under the Jones Act, an injury is considered caused by an act, or failure to act, when it appears, from a preponderance of the evidence in the case, that the "negligent act or omission, played any part, no matter how small, in bringing about or actually causing the injury."

The evidence shows that Larry Taylor negotiated the contract with Mobil Oil Corporation to repair the offshore platform. Under the agreement, Mobil Oil provided the vessel, State-Race, to transport the men and equipment to the platform and to serve as living quarters and a place of work for the Taylor crew. Plaintiff contends Taylor knew or should have known his employees would be performing work aboard the vessel, and knew or should have known it would be necessary for the plaintiff to stand on the stern of the vessel to supervise the work. It is plaintiff's position that Mr. Taylor knew or should have known that the vessel would be moored to the platform and he should have given special instructions to the captain to moor the vessel in such a manner as to prevent the mooring lines from coming over the rail, or he should have provided special equipment to protect his employees against this hazard.

Taylor's contention is that he delegated to plaintiff the duty to take all necessary precautions for the safety of Taylor's employees. The evidence shows that plaintiff was a competent and experienced oilfield worker. He had been engaged in oilfield work for approximately 40 years, the last 15 years of which he worked for Mobil Oil as a field foreman, and much of this last 15 years being devoted to offshore work. Plaintiff had retired from Mobil at the age of 62 and gone to work as a welding foreman for Taylor. During the negotiations, Mobil indicated it would like to have plaintiff supervise Taylor's work on the platform because Mobil knew plaintiff was well qualified.

Plaintiff's own testimony shows he understood he was in complete charge of the job, including the safety of the crew, and he felt he was capable of handling any situation that arose. Plaintiff testified as follows:

"Q I see. Did you consider it necessary for Mr. Taylor to give you any instructions as to checking the safety of this boat, STATE RACE?

"A Mr. Taylor and I had worked on similar jobs a number of times. We were both acquainted with the job, and it was kind of — just like you don't need any instructions to do your job.

"Q Yes sir.

"A Well, that's the way I was.

"Q Thank you. Well, do I — I gather from what you have just said, you felt you were just as capable as Mr. Taylor to handle any situation that arose?

"A I think that's correct; unless it concerns some technical part of welding that I wasn't versed on.

"Q And to particularly handle any question as to safety?

"A That's right."

We find no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent. Taylor delegated to plaintiff, a competent and experienced foreman, the duty to take any precautions necessary for the safety of the welding crew. There is no evidence that plaintiff could not or did not perform his duties as to safety. There is no evidence that the vessel was improperly moored. There is no evidence as to any type of special equipment which could have been secured by Taylor or by plaintiff to prevent the hawser from coming over the rail. In the absence of any evidence as to special mooring or special equipment which could have been used to prevent the accident, how can it be concluded that Taylor was negligent in failing to furnish such safety precautions?

Having concluded there is no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent, it is unnecessary for us to consider whether plaintiff was contributorily negligent or any of the other issues in the case.

For the reasons assigned, the judgment appealed is reversed and set aside. It is now ordered, adjudged and decreed that there be judgment herein in favor of the defendant, Taylor's Welding Service, Inc., rejecting plaintiff's demands at his cost. All costs of this appeal are assessed against the plaintiff appellee.

REVERSED AND RENDERED.

APPENDIX "C"

14TH JUDICIAL DISTRICT COURT
PARISH OF CAMERON
STATE OF LOUISIANA

DAVID M. BELL

versus No. 5293

TAYLOR'S WELDING SERVICE, INC., ET AL

This matter came on for trial on November 12, 13, 1973 by jury, and the jury having rendered a verdict in words and figures as follows, to-wit:

INTERROGATORIES TO JURY

1. Was David Bell a seaman

_____ or _____
YES NO

If your answer is NO to question number 1, *DO NOT ANSWER* any other questions.

If your answer is YES to question number 1, then answer question number 2.

2. Was Taylor's Welding Service, Inc. negligent, and if so, was such negligence a proximate cause of the accident?

_____ or _____
YES NO

If your answer is NO to question number 2. *DO NOT ANSWER* any further questions.

If your answer is YES to question number 2. then answer the remaining questions.

3. Was David Bell guilty of any contributory negligence that was a proximate cause of the accident?

_____ or ___✓___
YES NO

(If your answer to this question is NO do not answer question #4 but proceed to answer the remaining questions #5, 6 and 7.

4. If the answer to question number 3 is YES, what percentage of Bell's negligence contributed to the accident?

_____%

5. What amount of damages was sustained by David Bell as a result of the accident?

$ 36,000.00

(If contributory negligence on the part of David Bell was found to exist, you must reduce his total damages by the percentage of Bell's negligence)

6. Was the vessel, STATE RACE, unseaworthy?

_____ or ✓
YES NO

7. Was National Boat Company negligent, and if so, was such negligence a proximate cause of the accident?

_____ or ✓
YES NO

November 13, 1973 /s/ WALTER H. GRIFFITH
FOREMAN

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, DAVID M. BELL, and against the defendants TAYLOR'S WELDING SERVICE, INC., NORTH-WEST INSURANCE COMPANY, INDUSTRIAL FIRE AND CASUALTY COMPANY, DAVID BABINGTON HILL, and THOSE OTHER UNDERWRITERS AT LLOYD'S, LONDON, LONDON, ENGLAND, UNDER CERTIFICATE NUMBER 25,811, subject to the limits of liability provided for in policies of insurance issued by defendants, in the sum of THIRTY SIX THOUSAND DOLLARS ($36,000), subject to a credit of $3058.72 previously paid by Taylor's Welding Service, Inc. and North-West Insurance Company, together with interest at the rate of 7% from and after the date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third-party action filed herein by

Taylor's Welding Service, Inc., et al against National Boat Corporation be, and the same is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of the intervenor, the North-West Insurance Company, for $70.00 per week aggregating $3710.00 paid by it to plaintiff be and the same is hereby rejected at its costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert fee of Dr. David Drez be, and the same is hereby fixed at $75.00 and taxed as costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay all costs of this suit.

JUDGMENT SIGNED in Cameron, Louisiana, this 31 day of January, 1974.

/s/CECIL C. CUTRER
DISTRICT JUDGE

FEB 15 1975
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-889

DAVID M. BELL,

Petitioner,

versus

TAYLOR'S WELDING SERVICE, INC., ET AL,

Respondents.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-389

DAVID M. BELL,
Petitioner,
versus
TAYLOR'S WELDING SERVICE, INC., ET AL.
Respondents.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF OF RESPONDENTS IN OPPOSITION

MAY IT PLEASE THE COURT:

OPINIONS BELOW

The judgment of the Supreme Court of Louisiana dated October 24, 1974 denying the application of petitioner, David M. Bell for a writ of certiorari, or writ of review, to the Court of Appeal, Third Circuit, State of Louisiana is reported at 302 So. 2d 27: The judgment of the Supreme Court of Louisiana dated October 24, 1974 denying the application of respondents, Taylor's Service, Inc., the North-West Insurance Company, In-

dustrial Fire & Casualty Company and David Babbington Hill, for a writ of certiorari to the Court of Appeal, Third Circuit, State of Louisiana, because of the Court's denial of petitioner's writ application aforementioned is reported at 302 So. 2d 27.

The opinion of the Court of Appeal, Third Circuit, State of Louisiana dated July 29, 1974, reversing the jury verdict in favor of plaintiff against designated respondents and granting judgment in favor of designated respondents and against plaintiff is reported at 298 So. 2d 327; the Court of Appeal denied applications of both petitioner and respondents for rehearings on August 21, 1974 as will appear from the attached appendix "A".

JURISDICTION

Jurisdiction is conferred by 28 USC 1257 (3) and the Jones Act, 46 USC 688.

QUESTIONS PRESENTED

The questions presented in petitioner's application do not get to the heart of the matter. The second question is misleading because it assumes that the vessel on which plaintiff worked was unsafe when the inescapable conclusion to be drawn from the jury's finding of "No unseaworthiness" is that it was safe.

Simply stated, the precise questions presented for review are:

1.

In a Jones Act case may a state appellate court reverse a jury verdict in favor of an employee when there is no credible evidence of negligence, not even the slightest, on the part of an employer?

2.

In a Jones Act case is negligence on the part of an employer a prerequisite for a verdict in favor of an employee?

FEDERAL STATUTES

Plaintiff claims to be a Jones Act Seaman. The applicable federal statutes are the Jones Act, 46 USC 688 and the Federal Employers' Liability Act, 45 USC 51, et seq. on which the Jones Act is based.

The Jones Act, 46 USC 688 reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the commonlaw right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for

damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The pertinent portion of the Federal Employers' Liability Act states that the employee is entitled to damages for injury suffered during the course of his employment "*resulting in* whole or in part from *the negligence* of any of the officers, agents, or employees or such carrier, or by reasons of any defect or insufficiency, due to *its negligence*, in its cars, engines, appliances, machinery, track, load bed, works, boats, wharves, or other equipment." (emphasis ours)

STATEMENT OF THE CASE

Preliminarily, what does a respondent do, when a petitioner applies for certiorari based on the interpretation of a fact issue? What does the Court do? Does it accept as true all statements of a petitioner and grant the writ or does it accept as true all statements of a respondent and deny the writ? With a question of law these difficulties are not encountered. On an appeal the facts and law are fully briefed. Accordingly counsel for respondents concludes that a full and thorough statement of the case is necessary.

Again and solely for the Courts' attention, before giving a statement of the case, counsel for

respondents points out *that there is no evidence, whatsoever, to support petitioner's statements (petitioner's application at pages 5, 10, 16, and 17) that the hawser was improperly and insufficiently secured, that the vessel was improperly moored and that there was a hazardous condition aboard the vessel.* Clear proof of the lack of such evidence was established as hereinafter set out, by the jury's findings of fact.

A.

On March 19, 1973, David M. Bell (plaintiff or petitioner) filed suit for damages in the District Court for Cameron Parish against his employer, Taylor's Welding Service, Inc. and the National Boat Corporation. The relief sought against Taylor was under the Jones Act and general maritime law. By appropriate pleadings: plaintiff named the liability insurer of Taylor as additional defendants; the North-West Insurance Company, Taylor's workmen's compensation insurer, intervened to recover the workmen's compensation benefits paid to the plaintiff; Taylor named National Boat as a third party defendant to recover in full or in part, including attorneys fees, any damages that might be assessed against it.

B.

Plaintiff was a highly competent and experienced oil field worker, who at the time of the trial was approximately 65 years of age; he had been engaged in oil field work for the Mobil Oil Corporation for approximately 40 years when he retired on November 1.

1971; during the last 15 years that he worked for Mobil he worked in the capacities of field foreman and construction foreman; about one-half of the last 15 years was devoted to offshore work.

Plaintiff immediately after his retirement on November 1, 1971, went to work as a welding foreman for Taylor's Welding Service, Inc., a business principally owned by Larry Taylor and engaged in supplying crews to perform offshore welding services primarily for oil companies; plaintiff continued to work in that capacity for Taylor until his accident of March 11, 1972. Larry Taylor had known the plaintiff for five or six years and knew of his competence and ability as an offshore supervisory employee. Taylor's Welding Service, Inc. in November of 1971 was doing work for Mobil; Mobil indicated that it would like to have plaintiff employed by Taylor to do the work because of plaintiff's "know how" of the work to be done.

Mobil contracted with Taylor to make certain repairs to Mobil's stationary platform located in the Gulf of Mexico some 45 miles off the shore of Cameron Parish, Louisiana, with Taylor to furnish the necessary supervision and labor, the welding equipment, supplies and prefabricated structural material; Mobil engaged the National Boat Corporation (not clear from petitioner's application) to supply it with a vessel and a crew to transport Taylor's men to the platform, the vessel to be available to Taylor's crew for living quarters and also to be used as a base for some of the work to be done by Taylor's crew and diving crew. National Boat for these purposes provided the

M/V State Race and crew consisting of a captain, engineer, and deck hand. *The captain of the State Race was solely and completely in charge of its operation.*

Plaintiff boarded the State Race at the Mobil dock in Cameron, Louisiana, early on the morning of March 9, 1972. He took no part in the loading of Taylor's equipment, supplies and prefabricated structural material other than to direct that they be placed on the vessel so that they could be easily unloaded; during the trip to the platform, plaintiff was solely on the vessel as a passenger.

The State Race arrived at Mobil's platform at about ten or eleven o'clock that morning; Taylor's equipment was unloaded from the State Race to the platform. The State Race was moored to the platform, the plaintiff showing the Captain where to moor it so it would be convenient for the work to be done. Plaintiff had nothing, whatsoever, to do with the method and manner in which the State Race was moored. Thereafter the State Race was not moved from its initial mooring position unless it was moved at night and any such movement was done solely by the Captain. *Captain Tommy Suarez of the State Race had complete charge of the method and manner in which the State Race was moored to the platform.*

The accident occurred at approximately 1:30 P.M. on March 11, 1972; approximately for 45 minutes before the occurrence of the accident, plaintiff had been standing on the State Race directing the work on the stationary platform by the welder, Charles Murphy; at the time of the accident plaintiff was standing ap-

proximately one foot from the stern and one foot from the starboard; while in that position he was struck by the mooring line (hawser) that ran from the State Race to the platform. On the morning of March 11th and up to the time of the accident, the swells in the Gulf had been running according to plaintiff approximately three to four feet; plaintiff did not see the swell that came in immediately before the accident occurred, but he believes that it was a larger than usual swell and that this may have caused the State Race to drop and allow the mooring line to come over the starboard rail and strike him. Plaintiff was taken by helicopter to the Lake Charles Memorial Hospital in Lake Charles; he was treated by Drs. Drez and Akins, orthopedists; his injury was described as a displaced transverse fracture of the middle and distal third of the left femur. At the time of the trial, shortly less than two years following the accident, plaintiff had apparently reached maximum recovery, his chief disability being a partial loss of flexion of his injured leg.

Shortly prior to trial plaintiff settled with National Boat Corporation, reserving his rights against the other parties and agreeing to defend, indemnify and hold National Boat harmless against any claims asserted by Taylor and others against it. The Honorable Cecil C. Cutrer, trial judge, refused defendants' request that plaintiff produce the release given National Boat for inspection and filing in evidence. After the jury retired, Judge Cutrer ordered the production of the release and the filing of it in the record.

C.

The case was tried to a jury and submitted to it on written interrogatories. The jury found:

1. Plaintiff to be a seaman.

2. Taylor to be negligent and its negligence to be a proximate cause of the accident.

3. Plaintiff was not guilty of any contributory negligence that was a proximate cause of the accident.

4. The vessel State Race was not unseaworthy.

5. National Boat was not guilty of any negligence that was a proximate cause of the accident.

6. The plaintiff suffered damages in the amount of $36,000.00.

Based on the jury's findings, the honorable trial judge rendered judgment as follows:

1. In favor of plaintiff and against Taylor and its insurers in the amount of $36,000.00 with legal interest from date of judicial demand, the amount being subject to a credit of $3,058.72, with legal interest from date of judicial demand for that amount paid plaintiff by Taylor and North-West for medical expenses.

2. Rejecting the claim of intervenor North-West for $70.00 per week, aggregating $3,710.00 paid by it to the plaintiff.

3. Rejecting the third party demand of Taylor against National Boat.

Although not specifically set forth in the judgment, the honorable trial judge held that Taylor and its liability insurer were not entitled to a credit for the $26,290.00 paid by National Boat to the plaintiff.

D.

Taylor, its liability insurers, and North-West Insurance appealed to the Court of Appeal, Third Circuit, on all issues decided adversely to them.

E.

On July 29, 1974, the Court of Appeal, Third Circuit, handed down a written decision reversing the judgment of the trial court.

F.

Plaintiff timely filed an application for a rehearing on the judgment rendered by the Court of Appeal; Taylor, its liability insurers, and North-West timely filed an application for rehearing on the judgment rendered by the Court of Appeal, Third Circuit — this application being filed solely to preserve their rights in the event the Court of Appeal did grant plaintiff's

application for a rehearing and in the further event of plaintiff filing an application for a writ of review to the Supreme Court of Louisiana: on August 21, 1974, the Court of Appeal, Third Circuit, denied all applications for rehearing without assigning any reason therefor.

G.

As set out hereinbefore in "Opinions Below" all litigants applied to The Supreme Court of Louisiana for writs of certiorari (that of respondents being an alternative application and to be granted only in the event plaintiff's application was granted), which applications were denied.

H.

This matter is now before the Supreme Court of the United States on petitioner's application for a writ of certiorari.

ARGUMENT

The first question presented for review is:

1.

In a Jones Act case may a state appellate court reverse a jury verdict in favor of an employee when there is no credible evidence of negligence, not even the slightest, on the part of an employer?

The question requires an affirmative answer. The Federal Employers' Liability Act, itself, (Section 51) prescribes negligence of the employer as an essential ingredient for recovery when there is no violation of the Federal Safety Appliance Act:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part *from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, *due to its* negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (italics ours)

This Court in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943), in discussing negligence under the Act, as amended in 1939, stated:

"In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."

* * * *

"But the 1939 amendment left intact the foundation of the carrier's liability — negligence."

With the foregoing definition of negligence, the recognition of negligence as a foundation of the employer's liability and the Court's requirement in Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 1 L.Ed. 2d 493, 77 S.Ct. 443 (1957), that there must be some employer negligence, although the slightest, it follows that a state appellate, or as for that matter a federal appellate court, may reverse when there is no credible evidence of negligence.

Merely in confirmation of the foregoing principle, reference is made to Inman v. Baltimore & Ohio Railroad Company, 361 U.S. 138, 4 L.Ed. 2d 198, 80 S.Ct. 242 (1959), in which this Court after argument affirmed an Ohio appellate court decision reversing a jury verdict in favor of the employee on the basis that there was no evidence showing any negligence on the part of the employer.

A corollary question to the first question presented is: Did the Court of Appeal, Third Circuit, State of Louisiana in its finding of no employer negligence correctly follow the precepts established by the federal jurisprudence for appellate review of factual issues in a Jones Act case? The decision of the Court of Appeal is a complete answer to this question — the opinion is attached as Appendix "B". The Court of Appeal stated:

> "Before discussing the issues, it is appropriate to state the scope of our appellate review. In civil cases involving state law, the appellate courts of Louisiana have constitutional authority to review both the law and the facts. However, a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, an appellate court cannot disturb the finding of a trial jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion. See Trahan v. Gulf Crews, Inc., La. 255 So2d 63 (1971) and the cases cited."

The Supreme Court of Louisiana in Trahan, supra, referred to the federal jurisprudence including Rogers, supra, and among other things said:

> "* * * in such cases the judicial right of review of facts is restricted to the single inquiry of whether, within reason, the evidence adduced supports the conclusion that the negligence of

the employer played any part at all in the injury or death of the employee."

After making the foregoing statement, the Court of Appeal proceeded to carefully analyse the evidence to determine if there was any showing that the employer Taylor was negligent. The Court of Appeal stated:

"We find no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent. Taylor delegated to plaintiff, a competent and experienced foreman, the duty to take any precautions necessary for the safety of the welding crew. There is no evidence that plaintiff could not or did not perform his duties as to safety. *There is no evidence that the vessel was improperly moored.* There is no evidence as to any type of special equipment which could have been secured by Taylor or by plaintiff to prevent the hawser from coming over the rail. In the absence of any evidence as to special mooring or special equipment which could have been used to prevent the accident, how can it be concluded that Taylor was negligent in failing to furnish such safety precautions?

Having concluded there is no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent, it is unnecessary for us to consider whether plaintiff was contributorily negligent or any of the other issues in the case." (italics ours)

Although the statement of the Court of Appeal that *"There is no evidence that the vessel was improperly moored."* was obviously based on its own review of the record, this is exactly what the jury found when pursuant to an interrogatory directed to it, it stated that the State Race was not unseaworthy — see attached as Appendix "C" a printed copy of a certified copy of the judgment of the trial court which includes the interrogatories propounded to the jury and its answers thereto.

Petitioner predicates his whole case on the negligence of Taylor in failing to provide him a safe place to work. How could petitioner's work place, the State Race, be not safe when the jury found the State Race not unseaworthy. And this finding of the jury of the State Race being not unseaworthy establishes the correctness of the state appellate court's holding that there was no negligence on the part of Taylor.

Petitioner, as pointed out in our introductory remarks to the statement of the case, said in his application (pages 5, 10, 16, and 17) that the hawser was improperly and insufficiently secured, that the vessel was improperly moored and that there was a hazardous condition aboard the vessel — these statements are not established by any evidence, whatsoever, and in fact are refuted by the jury's finding of no unseaworthiness.

The second question presented for review is:

2.

In a Jones Act case is negligence on the part of an employer a prerequisite for a verdict in favor of an employee?

Actually this question may be superfluous, as in the discussion of the first question presented it is abundantly clear that negligence is a prerequisite for imposition of liability on the employer except in cases involving the Federal Safety Appliance Act.

The question is presented because petitioner seems to infer that the failure of the employer to furnish a safe place to work is negligence per se. In the case at bar, this is begging the question as the jury in its finding of no unseaworthiness declared that petitioner had a safe place to work. Nevertheless, the liability for the failure of the employer is predicated on negligence. The Act imposes liability on the employer for injury "by reason of any defect or insufficiency, due to its negligence, in its * * * * * Works * * * *". Also see Inman, supra, and Baltimore and Ohio Railroad Company v. Berry, 286 U.S. 272, 76 L.Ed. 1098 52 S.Ct. 510 (1932). It follows that even if petitioner's place of work was unsafe, which it was not, petitioner had the duty of showing negligence on the part of Taylor. As pointed out in the quotation on page 14 of this brief from the decision of the Court of Appeal, Third Circuit, there was no evidence as to what, if anything, Taylor could have done to prevent the accident. Epling v. M. T. Epling Company, 435 F.2d 732 (6th Cir. 1970) cited by petitioner in his application supports that there must

be a foreseeability of harm on the part of the employer as to the existence of an unsafe place to work in order to impose liability.

To the same effect see Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, 9 L.Ed. 2d 618, 83 S.Ct. 659 (1963) in which the Court stated:

> "We agree with respondent that reasonable foreseeability is an essential ingredient of Federal Employers' Liability Act negligence."

CONCLUSION

I.

The Court of Appeal, Third Circuit, State of Louisiana correctly applied the federal jurisprudence established for a Jones Act case in determining that the jury verdict in favor of the plaintiff was not based on any fact showing negligence, even the slightest, on the part of Taylor's Welding works, Inc. related to plaintiff's accident.

II.

A fortiori, the jury finding of no unseaworthiness on the part of the vessel State Race gives substance to the decision of the Court of Appeal, Third Circuit, State of Louisiana holding that there was no negligence on the part of Taylor's Welding Service, Inc., as there had to be unseaworthiness of the State Race for there to be any negligence on the part of Taylor.

III.

We respectfully ask for the foregoing reasons that the decision of The Supreme Court of Louisiana, denying petitioner's application for a writ of certiorari to the Court of Appeal, Third Circuit, State of Louisiana, be affirmed and that accordingly petitioner's application for a writ of certiorari to the Supreme Court of the United States be denied.

Respectfully submitted.

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Attorneys for Respondents
Taylor's Welding Service, Inc.,
The North-West Insurance Company and Industrial Fire & Casualty Company

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that I have this day served upon each attorney for the petitioner herein, Glenn Alexander of Jones & Jones, Post Office Box M, Cameron, Louisiana and Robert M. McHale, 1901 Oak Park Boulevard, Lake Charles, Louisiana three copies of the foregoing opposition brief of respondents by mailing the same to each of the said attorneys of record at Lake Charles, Louisiana this ____ day of February, 1975.

FRANK M. BRAME

APPENDIX "A"

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
OFFICE OF THE CLERK

Lake Charles, La., August 21, 1974

Dear Sir:

Rehearing was this day refused in the case entitled David M. Bell v. National Boat Corp., et al.

No. 4589

both applications denied.

Cordially yours,
KENNETH J. de BLANC,
Clerk

APPENDIX "B"

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

P. O. Box 3000
Lake Charles

Dear Sir:

Attached you will find copy of opinion in a case in which you are an attorney of record.

Your attention is invited to Rule XI of the Uniform Rules of the Courts of Appeal, especially the following sections:

"Section 1. Notice of judgments of the court will be delivered personally, or by certified or registered mail, by the clerk of court to at least one of counsel for each of the parties litigant, and applications for rehearing and briefs in support thereof must be filed in sextuple copies on or before the fourteenth calendar day after, but not including, the date of receipt of such notice; and no extension of time therefor shall be granted. (Emphasis supplied.)

"Section 2. In the case of an application for rehearing sent through the mail for filing, it shall be deemed timely filed when the official U. S. postmark upon the envelope transmitting such application shows that it was mailed on or before the fourteenth calendar day following the date notice of the pertinent judgment was given, as reflected by the records maintained by the clerk of court.

"Section 3. If the applicant for rehearing desires further time for filing of brief in support of his applica-

tion, he shall request additional time in his application and the court may grant or refuse such delay in its discretion."

Cordially yours,

KENNETH J. de BLANC
Clerk of Court

NUMBER 4589

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

DAVID M. BELL
Plaintiff & Appellee

versus

NATIONAL BOAT CORPORATION, ET AL.
Defendants & Appellants

Appeal from the Fourteenth Judicial District Court for the Parish of Cameron, Judge Cecil C. Cutrer presiding

Before Hood, Culpepper and Miller, Judges

Culpepper, Judge

The plaintiff, David M. Bell, filed this suit for damages for personal injuries under the Jones Act and

general maritime law. He named as defendants National Boat Corporation, the owner of the vessel on which he was working at the time he sustained the injury, and Taylor's Welding Service, Inc., his employer at the time of the accident. Prior to trial, plaintiff compromised his claim against National Boat Corporation and its insurer for the sum of $26,290, plus an additional sum up to $3,710 to be paid in the event Bell failed to recover the total of these sums from Taylor.

In the trial in the district court, a jury returned a verdict in favor of plaintiff and against defendant, Taylor's Welding Service, Inc., for the sum of $36,000. Taylor's third party demand against National Boat Corporation was rejected because the jury found the vessel seaworthy and found no negligence by National Boat Corporation or its captain. The district court entered judgment on the jury verdict, denying Taylor and its insurer any credit for the amount received by plaintiff in his settlement with National Boat Corporation. The district judge also rejected the claim of Taylor's insurer for reimbursement of $3,710 paid to plaintiff in workmen's compensation benefits, but recognized Taylor's insurer's claim for the sum of $3,058.72 paid to plaintiff for medical expenses and cure.

Taylor and its insurer appealed the judgment against them in favor of plaintiff. They also appealed from the judgment rejecting their third party demand against National Boat Corporation. The intervenor, North-West, appealed from the judgment rejecting its claim for reimbursement for workmen's compensation payments.

The decisive issues are: (1) Was the plaintiff a seaman? (2) Was Taylor's Welding Service, Inc. an employer under the Jones Act? (3) Was Taylor's Welding Service, Inc. guilty of any negligence which was a cause of the accident?

Taylor's Welding Service, Inc., principally owned by Larry Taylor, was engaged in the business of supplying welding services for offshore well platforms. Taylor contracted to do certain welding repair work on a production platform of Mobil Oil Corporation, about 40 miles off the shore of Cameron Parish, Louisiana. Under the agreement, Taylor furnished the necessary labor, equipment and supplies to perform the welding. Mobil Oil supplied the vessel to transport Taylor's crew to the platform, the vessel to be available to Taylor's crew for living quarters and as a base for the repair work, some of which was near and below water level on the platform.

Taylor designated plaintiff as foreman of the welding crew, which consisted of a welder and a helper. Mobil gave plaintiff instructions as to the work to be done. Mobil also contracted with National Boat Corporation to supply the vessel, State-Race, and a crew consisting of a captain, an engineer and a deckhand.

Under Bell's supervision, Taylor's welding crew and all of their equipment and materials were loaded onto the State-Race in Cameron, Louisiana at the Mobil docks. A diving crew, not furnished by Taylor and not under Bell's supervision, also boarded the vessel with its equipment. The vessel proceeded to the platform. As foreman of Taylor's crew, plaintiff ad-

vised the captain where he wanted the vessel positioned to perform the welding. The diving crew also advised the captain as to the position in which it desired the vessel to be moored for its work. The method of mooring the vessel in those positions was under the sole control of the captain.

At the time of the accident, the vessel was moored with a hawser from the starboard stern bit, located 6 to 8 feet forward of the stern. The hawser ran aft 25 or 30 feet from the bit to the place where it was tied to the platform. The stern of the vessel was placed toward the direction from which the waves were coming.

Some of the welding equipment and supplies were unloaded from the vessel onto the platform, and the work had been in progress for two or three days when the accident occurred. Plaintiff was on the stern of the vessel directing the work of the welder on the platform. For about 45 minutes before the accident, plaintiff had been standing about one foot from the stern and one foot from the starboard rail. While standing in that position, a wave caused the stern of the vessel to drop, and the hawser came over the starboard rail and struck plaintiff on the leg, causing a fracture.

The evidence shows that the swells in the gulf had been running approximately three to four feet in heighth. No difficulty had been experienced with the hawser prior to the accident. The swell that came in immediately before the accident was larger than usual, and this is what caused the stern of the vessel to drop and allow the mooring line to come over the starboard rail.

Before discussing the issues, it is appropriate to state the scope of our appellate review. In civil cases involving state law, the appellate courts of Louisiana have constitutional authority to review both the law and the facts. However, a Louisiana appellate court's review of a jury verdict in a suit under the Jones Act, is the same as that of the Federal Courts. Under Federal law and jurisprudence, an appellate court cannot disturb the finding of fact of a trial jury on the merits unless there is no reasonable evidentiary basis for the jury's conclusion. See Trahan v. Gulf Crews, Inc., La., 255 So.2d 63 (1971) and the cases cited.

WAS PLAINTIFF A SEAMAN?

The first issue is whether the plaintiff was a seaman within the meaning of the Jones Act, 46 USCA 688. The recent case of Barrios v. Louisiana Construction Materials Company, 465 F.2d 1157 (5th Cir. 1972) states the three traditional requirements for qualification as a seaman: (1) There must be a vessel in navigation. (2) The individual must have a more or less permanent connection with the ship. (3) The capacity in which the individual is employed, or the duties which he performs, must contribute to the function of the vessel or to the accomplishment of its mission.

Under these tests, we have little difficulty in concluding that the plaintiff in the present case was a seaman. The State-Race was a vessel in navigation. The plaintiff was living and working on the vessel during the performance of his duties as foreman of the welding crew. The duties which plaintiff was performing contributed to the function or mission of the

vessel, which was to assist in the repair of the platform. There was clearly sufficient evidence to support the jury finding that plaintiff was a seaman under the Jones Act.

WAS TAYLOR A JONES ACT EMPLOYER?

In Barrios v. Louisiana Construction Materials Company, supra, the court recognizes there is a substantial conflict in the cases from Federal appellate courts on the question of whether a Jones Act employer must have control of the operation of the vessel to which the injured seaman was attached. Some cases hold that a Jones Act employer must have operational control of the vessel. Other cases allow Jones Act recovery against an employer who does not own or control the vessel but controls only the operation which resulted in the seaman's injury. In Barrios, the court allowed Jones Act recovery, even though the jury found that the employer did not have operational control over the vessel.

The facts in Barrios were that Williams-McWilliams contracted with The Greater Lafourche Port Commission to construct a flood protection levee. Williams-McWilliams leased a 90-ton dragline from Louisiana Construction Materials Company. The plaintiff, Barrios, had been an oiler on the dragline for Louisiana Construction, so Williams-McWilliams employed Barrios to continue those duties. The dragline was transported to the construction site on a barge owned and controlled by Louisiana Construction. The barge was not leased to Williams-McWilliams.

The barge remained at the work site and was used to furnish oil, fuel, equipment and other services for the dragline. While the dragline was operating on the shore, about 500 feet from the barge, it became bogged down in mud. The barge was sent back to secure a second dragline to pull the bogged dragline out of the mud. After the second dragline had been loaded on the barge, and the spuds at each end of the barge were being lifted, one of the spud cables became fouled. While physically pulling on the fouled cable, Barrios sustained an injury to his back.

The jury found that Barrios was a member of the crew of the barge and was a seaman, that he was injured on the barge while in the course of his employment by Williams-McWilliams, that Williams-McWilliams was negligent, and that this negligence was a cause of Barrios's injuries. Based on these findings, judgment was entered against Williams-McWilliams under the Jones Act.

However, the jury also found that Louisiana Construction Materials Company was the operator of the barge and thus liable to Barrios under the general maritime law, because of the unseaworthiness of the barge. Williams-McWilliams argued that since the jury found it was not the operator of the barge, it could not be liable under the Jones Act. The court held that although Louisiana Construction had control over the barge, Williams-McWilliams had control over the operations which resulted in injury to Barrios, and this is sufficient to support Jones Act liability.

We are unable to distinguish Barrios from the present case. In its brief, Taylor states that in Barrios,

Williams-McWilliams had leased the spud barge from Louisiana Construction, and therefore had control of the vessel, whereas in the present case Mobil Oil had leased the State-Race and Taylor had no control whatever over the vessel. As we read the Barrios decision, it clearly states (465 F.2d 1164) that Williams-McWilliams had leased only the dragline and had not leased the barge, which was being towed by Louisiana Construction's tug and was under the control of Louisiana Construction. The present case and Barrios are therefore the same in that plaintiff's employer was not in control of the vessel.

We conclude that under the Barrios decision the defendant Taylor in the present case was a Jones Act employer.

WAS TAYLOR NEGLIGENT?

The next issue is whether Taylor was guilty of negligence which was a cause of the accident. The district judge's charge to the jury correctly states the law on employer negligence under the Jones Act as follows:

> "We next turn to the question of whether the employer, Taylor's Welding Service, was negligent within the meaning of the Jones Act.
>
> "In order to recover, the plaintiff must prove that the employer was negligent. And the first question you must consider therefore is: What is negligence?
>
> "Negligence is the doing of some act that a reasonably prudent person would not do, or

the failure to do something a reasonably prudent person would do, under the same or similar circumstances. It is, in other words, the failure to use ordinary care under the circumstances.

"The mere *occurrence* of an accident, of course, does not raise any presumption of negligence.

"The obligation of an employer under the Jones Act for the safety of seamen is substantially greater than that of an ordinary employer to his employee. The word 'negligence' therefore, as used in the Jones Act, which makes the employer of seamen liable for his negligence, must be given a liberal interpretation. It includes any breach of any obligation that the employer owes to seamen, including the obligation of seeing to the safety of the crew.

Under the Jones Act, if the employer committed, through its officers, agents or employees, some negligent act or omission that played any part, no matter how small, in actually bringing about the injury to David Bell, then you should find that the employer was negligent.

"Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a legal duty to provide their employees with a safe place in

which to work. If you find that in this case the plaintiff was injured because the defendant failed to furnish him with a reasonably safe place to work and that the plaintiff's working conditions could have been made safe through the exercise of reasonable care, then you may find that the defendant was negligent.

"In addition to proving that the employer was negligent as I have previously explained, David Bell must prove that such negligence was a contributing cause of the accident. This brings up the law of 'causation'.

"Under the Jones Act, an injury is considered caused by an act, or failure to act, when it appears, from a preponderance of the evidence in the case, that the "negligent act or omission," played any part, no matter how small, in bringing about or actually causing the injury."

The evidence shows that Larry Taylor negotiated the contract with Mobil Oil Corporation to repair the offshore platform. Under the agreement, Mobil Oil provided the vessel, State-Race, to transport the men and equipment to the platform and to serve as living quarters and a place of work for the Taylor crew. Plaintiff contends Taylor knew or should have known his employees would be performing work aboard the vessel, and knew or should have known it would be necessary for the plaintiff to stand on the stern of the vessel to supervise the work. It is plaintiff's position that Mr. Taylor knew or should have known that the

vessel would be moored to the platform and he should have given special instructions to the captain to moor the vessel in such a manner as to prevent the mooring lines from coming over the rail, or he should have provided special equipment to protect his employees against this hazard.

Taylor's contention is that he delegated to plaintiff the duty to take all necessary precautions for the safety of Taylor's employees. The evidence shows that plaintiff was a competent and experienced oilfield worker. He had been engaged in oilfield work for approximately 40 years, the last 15 years of which he worked for Mobil Oil as a field foreman, and much of this last 15 years being devoted to offshore work. Plaintiff had retired from Mobil at the age of 62 and gone to work as a welding foreman for Taylor. During the negotiations, Mobil indicated it would like to have plaintiff supervise Taylor's work on the platform because Mobil knew plaintiff was well qualified.

Plaintiff's own testimony shows he understood he was in complete charge of the job, including the safety of the crew, and he felt he was capable of handling any situation that arose. Plaintiff testified as follows:

"Q I see. Did you consider it necessary for Mr. Taylor to give you any instructions as to checking the safety of this boat. STATE RACE?

"A Mr. Taylor and I had worked on similar jobs a number of times. We were both acquainted with the job, and it was kind of — just like you don't need any instructions to do your job.

"Q Yes sir.
"A Well, that's the way I was.
"Q Thank you. Well, do I — I gather from what you have just said, you felt you were just as capable as Mr. Taylor to handle any situation that arose?
"A I think that's correct; unless it concerns some technical part of welding that I wasn't versed on.
"Q And to particularly handle any question as to safety?
"A That's right."

We find no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent. Taylor delegated to plaintiff, a competent and experienced foreman, the duty to take any precautions necessary for the safety of the welding crew. There is no evidence that plaintiff could not or did not perform his duties as to safety. There is no evidence that the vessel was improperly moored. There is no evidence as to any type of special equipment which could have been secured by Taylor or by plaintiff to prevent the hawser from coming over the rail. In the absence of any evidence as to special mooring or special equipment which could have been used to prevent the accident, how can it be concluded that Taylor was negligent in failing to furnish such safety precautions?

Having concluded there is no reasonable evidentiary basis for the jury's conclusion that Taylor was negligent, it is unnecessary for us to consider whether

plaintiff was contributorily negligent or any of the other issues in the case.

For the reasons assigned, the judgment appealed is reversed and set aside. It is now ordered, adjudged and decreed that there be judgment herein in favor of the defendant, Taylor's Welding Service, Inc., rejecting plaintiff's demands at his cost. All costs of this appeal are assessed against the plaintiff appellee.

REVERSED AND RENDERED.

APPENDIX "C"

14TH JUDICIAL DISTRICT COURT
PARISH OF CAMERON
STATE OF LOUISIANA

DAVID M. BELL

vs. No. 5293

TAYLOR'S WELDING SERVICE, INC., ET AL

JUDGMENT

This matter came on for trial on November 12, 13, 1973 by jury, and the jury having rendered a verdict in words and figures as follows, to-wit:

INTERROGATORIES TO JURY

1. Was David Bell a seaman

✓	or	
YES		NO

If your answer is NO to question number 1, *DO NOT ANSWER* any other questions.

If your answer is YES to question number 1, then answer question number 2.

2. Was Taylor's Welding Service, Inc. negligent, and if so, was such negligence a proximate cause of the accident?

✓	or	
YES		NO

If your answer is NO to question number 2, *DO NOT ANSWER* any further questions.

If your answer is YES to question number 2, then answer the remaining questions.

3. Was David Bell guilty of any contributory negligence that was a proximate cause of the accident?

_____ or __✓__
YES NO

(If your answer to this question is NO do not answer question #4 but proceed to answer the remaining questions #5, 6 and 7.

4. If the answer to question number 3 is YES, what percentage of Bell's negligence contributed to the accident?

_____%

5. What amount of damages was sustained by David Bell as a result of the accident?

$ 36,000.00

(If contributory negligence on the part of David Bell was found to exist, you must reduce his total damages by the percentage of Bell's negligence)

6. Was the vessel, STATE RACE, unseaworthy?

_____ or ___✓___
YES NO

7. Was National Boat Company negligent, and if so, was such negligence a proximate cause of the accident?

_____ or ___✓___
YES NO

November 13, 1973 /s/ WALTER H. GRIFFITH
FOREMAN

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, DAVID M. BELL, and against the defendants, TAYLOR'S WELDING SERVICE, INC., NORTH-WEST INSURANCE COMPANY, INDUSTRIAL FIRE AND CASUALTY COMPANY, DAVID BABINGTON HILL, and THOSE OTHER UNDERWRITERS AT LLOYD'S, LONDON, LONDON, ENGLAND, UNDER CERTIFICATE NUMBER 25,811, subject to the limits of liability provided for in policies of insurance issued by defendants, in the sum of THIRTY SIX THOUSAND DOLLARS ($36,000), subject to a credit of $3058.72 previously paid by Taylor's Welding Service, Inc. and North-West Insurance Company, together with interest at the rate of 7% from and after the date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the third-party action filed herein by

Taylor's Welding Service, Inc., et al against National Boat Corporation be, and the same is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of the intervenor, the North-West Insurance Company, for $70.00 per week aggregating $3710.00 paid by it to plaintiff be and the same is hereby rejected at its costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert fee of Dr. David Drez be, and the same is hereby fixed at $75.00 and taxed as costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay all costs of this suit.

JUDGMENT SIGNED in Cameron, Louisiana, this 31 day of January, 1974.

/s/CECIL C. CUTRER
DISTRICT JUDGE

FILED
APR 7 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1002

TAYLOR'S WELDING SERVICE, INC., ET AL.,
Petitioners,

versus

DAVID M. BELL,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

MEMORANDUM OF PETITIONERS IN SUPPORT OF TIMELY FILING OF APPLICATION FOR WRIT

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MAY IT PLEASE THE COURT:

STATEMENT

The Supreme Court of Louisiana on October 24, 1974, denied applications of all parties for writs of certiorari or review to be directed to the Court of Appeal, Third Circuit, State of Louisiana, which Court had rendered judgment completely in favor of petitioners, Taylor's Welding Service, Inc., et al and against respondent, David M. Bell.

On or about January 20, 1975, respondent Bell filed with this Court a petition for a writ of certiorari. The application bears No. 74-889. This petition was filed on the 88th day of the ninety days allotted for such a filing. 28 USC 2101(c); Rule 22. Notice of the filing was received by the undersigned attorney of record for petitioners on or about January 20, 1975, and by another attorney of record for one of petitioners on January 23rd, 1975. On January 24, 1975, undersigned counsel mailed to the Clerk of Court a petition requesting additional time to file a petition for an alternative writ of certiorari; on February 3, 1975, the Honorable Lewis F. Powell, Jr. signed an order granting petitioners through February 6, 1975 to file a petition for a writ of certiorari without prejudice to the Court's consideration of whether the application had been timely filed (No. A-631); petitioners' application for a writ of certiorari was filed on February 6, 1975 (No. 74-1002).

QUESTION PRESENTED

May a litigant, which has obtained a final state court judgment completely in its favor apply for an alternative or cross writ of certiorari after the lapse of ninety days from the date of the judgment to review questions not raised by the petition of certiorari filed very late in the ninety day period by the litigant against whom the judgment was rendered?

ARGUMENT

With the final judgment of the Supreme Court of Louisiana completely in their favor, petitioners had

no occasion to act until copies of the application of David M. Bell in No. 74-889 were received on the 88th and 91st day following the final judgment of the Supreme Court of Louisiana. Up until that time the filing of an application for a writ of certiorari by undersigned counsel would have been a disservice to the petitioners: It would have been a vain and useless thing because the final judgment of the Supreme Court of Louisiana was completely in favor of petitioners. It may have had the effect of alerting respondent to file a petition for a writ of certiorari and thus expose petitioners to unnecessary litigation; petitioners would have been unnecessarily burdened with substantial legal fees and moderate court costs.

Under the foregoing circumstances, counsel suggests that a logical, fair and equitable interpretation of 28 USC 2101(c) carried over verbatim for all practical purposes into Rule 22, paragraph 1, is that the final sentence reading "a Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days," was designed precisely to take care of the instant situation. Prior to a move by respondent, David M. Bell, petitioners had no cause to file; a cause did arise, and certainly a good one, when respondent David M. Bell filed his application for a writ of certiorari on the 88th day.

We further submit that the issue is not jurisdictional because the only limitation placed on the right to a sixty day extension for good cause shown is not statutory but that of the Court — Rule 34, paragraph 2, which states that applications for extension of time to file

petitions for certiorari shall be submitted at least ten days before the expiration of the period sought to be extended.

Your Honors on a number of occasions have granted petitions for writs of certiorari that were filed after the ninety day period. This Court in two cases has granted such applications in situations identical to those at bar. In Brotherhood of Railroad and S.S. Clerks vs. Florida East Coast Railroad Co., 382 US 1008, 86 Sup. Ct. 615, 15 L. Ed. 2d 524, the Government toward the very end of the ninety day delay filed an application for extension of time to file its petition for certiorari and an extension was granted; more than ninety days after the final judgment of the Court below, the Railway which had intended to petition for certiorari in the case *only in the event that the Government did so*, applied for a modification of the extension of time previously granted to the Government so as to include all parties in the matter; separate petitions for certiorari were then filed by the Government, the Railway and the Unions; the Court granted all of the petitions and subsequently judgment was affirmed on the merits.*

Your Honors in Pierson vs. Ray, 384 US 938, 86 Sup. Ct. 1457, 16 L. Ed. 2d 537, entertained a cross-petition for certiorari filed approximately 120 days after the final judgment of the lower Court when there had been no request for any extension of time to file such petition. The cross-petition requested that *in the*

* These facts are not stated in the reported cases, however, undersigned counsel has been informed that the facts are in the records of the cases.

event the main petition for certiorari were granted, then certiorari should be also granted to review a further question not raised by the main petition for certiorari but on which the respondent wanted review. The Court considered the main petition and cross-petition and subsequently decided both on the merits.*

CONCLUSION

We submit that the petition of Taylor's Welding Service, Inc., et al was timely filed and that in the event the Court should grant the main petition for certiorari in number 74-889, the Court then should grant this petition for certiorari so to consider at one and the same time all of the matters raised by both petitions.

Respectfully submitted.

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* See *supra*, p. 4.

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that I have this day served upon each attorney for the petitioner herein, Glenn Alexander of Jones & Jones, Post Office Box M, Cameron, Louisiana and Robert M. McHale, 1901 Oak Park Boulevard, Lake Charles, Louisiana three copies of the foregoing memorandum in support of the timely filing of petitioners' application for writ of certiorari by mailing the same to each of the said attorneys of record at Lake Charles, Louisiana this ____ day of April, 1975.

_____

FRANK M. BRAME